

No. 12906

United States
Court of Appeals

for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

RINA MARIA VATUONE, as Administratrix of
the Estate of Paul D. Vatuone, Deceased,

Appellee.

Apostles on Appeal

Appeal from the United States District Court,
Northern District of California,
Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS

FRANK J. HENNESSY,

United States Attorney,
P. O. Bldg., San Francisco,

Proctor for Appellant.

RYAN & RYAN,

ROBERT McMAHON,

800 Phelan Bldg.,
San Francisco 2, Calif.,

Proctors for Appellee.

In the District Court of the United States for the
Northern District of California, Southern Di-
vision

No. 25476R

RINA MARIA VATUONE, as Administratrix of
the ESTATE OF PAUL D. VATUONE, De-
ceased,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

**LIBEL FOR DAMAGES FOR WRONGFUL
DEATH BROUGHT UNDER THE PROVI-
SIONS OF THE PUBLIC VESSELS ACT**

The libel of Rina Maria Vatuone, as adminis-
tratrix of the estate of Paul D. Vatuone, deceased,
against the above-named respondent, in a cause of
libel, civil and maritime, for damages for wrongful
death, respectfully shows and alleges as follows:

I.

That on the 12th day of July, 1949, libelant was
duly and regularly appointed administratrix of the
estate of Paul D. Vatuone, deceased, by the Supe-
rior Court of the State of California, in and for
the City and County of San Francisco; that she
thereupon duly qualified as such administratrix of
said estate, and ever since such time has been and
now is the duly appointed, qualified and acting ad-

ministratrix of the estate of Paul D. Vatuone, deceased.

II.

That libelant is a resident of the City and County of San Francisco, State of California.

III.

That respondent, United States of America, is a sovereign nation.

IV.

That this action is brought under the provisions of the Public Vessels Act, 46 U. S. C. A., 741 et seq.

V.

That respondent at all times herein mentioned was the owner and operator of the United States Army Transport "General Altman," which vessel was at all times herein mentioned owned, operated and engaged by respondent as a public vessel as defined in the Public Vessels Act of 1925, 46 USCA, Section 781 et seq., and said vessel was employed by respondent in the operations and business of the United States Army Transport Service.

VI.

That on the 15th day of June, 1949, said vessel was in navigable waters of the United States alongside a dock in Oakland, California; that at said time, Paul D. Vatuone, deceased, was an employee of respondent, employed by it as a maintenance man in the marine repair shop of the United States Army Transport Service at Fort Mason, San Francisco, California, and was directed by respondent

to go on board said vessel and to do certain work thereon; that in the course of his employment, said decedent, along with other workmen of respondent, were engaged in testing the workings of Life boat No. 5 on said vessel; that in the course of said work said decedent and others were manually working a certain winch; that at said time and place the respondent carelessly and negligently put in operation the motor operating said winch so that said winch suddenly and very swiftly revolved around and the handle of said winch struck said decedent with such force and threw him so violently that he was killed.

VII.

That said decedent left surviving him libelant herein, who is his widow of the age of thirty-eight years, and a daughter named Paulette Teresa Vatuone, age seven years; that said parties are the sole heirs at law of said decedent; that each of them were totally dependent upon said decedent for support; that this libel is brought for and on behalf of said heirs of said decedent; that at the time of his death said decedent was of the age of forty-four years and was in good health and was earning approximately \$300.00 a month.

VIII.

That by reason of the premises libelant and her daughter have been damaged in the sum of One Hundred Thousand Dollars (\$100,000.00).

Wherefore, libelant prays that a citation in due form of law may issue against respondent, citing

it to appear and answer all and singular the matters set forth herein, and that libelant have judgment for the sum of One Hundred Thousand Dollars (\$100,000.00) damages against respondent, for her costs of suit herein and for such other and further relief as may be meet and proper in the premises.

RYAN & RYAN,

By /s/ THOS. C. RYAN,

/s/ ROBERT McMAHON,

Proctors for Libelant.

State of California,

City and County of San Francisco—ss.

Thomas C. Ryan, being first duly sworn, deposes and says:

That he is one of the proctors for the libelant in the foregoing action; that he makes this verification in the place of libelant because libelant is at the present time outside the City and County of San Francisco where her attorneys have their office, to wit, in the City of Santa Rosa, County of Sonoma, State of California; that your affiant is familiar with the facts concerning libelant's cause of action; that he has read the foregoing libel and knows the contents thereof; that the same is true of his own knowledge, except as to those matters stated therein on information and belief and as to those matters he believes it to be true.

/s/ THOS. C. RYAN.

Subscribed and sworn to before me this 1st day of August, 1949.

[Seal] /s/ ESTHER C. HUSER,
Notary Public.

In and for the City and County of San Francisco,
State of California.

[Endorsed]: Filed August 1, 1949.

[Title of District Court and Cause.]

ANSWER

Now comes the Respondent, United States of America, and answers the libel on file herein as follows:

I.

Respondent has no information or belief as to the allegations of Article I and demands strict proof thereof.

II.

Respondent has no information or belief as to the allegations of Article II and demands strict proof thereof.

III.

Respondent admits the allegations of Article III.

IV.

As to the allegations of Article IV, respondent leaves matters of jurisdiction to the Court.

V.

Respondent admits the allegations of Article V.

VI.

Answering Article VI of said libel, respondent admits that on the 15th day of June, 1949, Paul D. Vatuone was employed by respondent as a rigger in the Marine Repair Shop, San Francisco Port of Embarkation, Fort Mason, California. Admits that on said day Paul D. Vatuone, pursuant to said employment, was performing services at the direction of respondent on the United States Army Transport General Altman while said vessel was in berth in navigable waters of the United States at Pier No. 4, Oakland Army Base, Oakland, California; admits that on said day, while so employed, Paul D. Vatuone was accidentally struck by a revolving crank handle to a lifeboat winch and sustained injuries therefrom, from which he died.

Respondent denies that it carelessly or negligently, or at all, put in operation the motor operating said winch; denies that said accident and death of Paul D. Vatuone was due to any carelessness or negligence of respondent; denies each and every allegation of Article VI inconsistent with the admissions and denials of this paragraph.

VII.

Answering Article VII of said libel, respondent denies that at the time of his death, Paul D. Vatuone was earning \$300.00 a month, and alleges that his said monthly earnings were approximately \$250.00. Respondent has no information or belief as to the remaining allegations of Article VII and demands strict proof thereof.

VIII.

Respondent denies the allegations of Article VIII.

As and for a First Separate and Distinct Defense to the Libel on File Herein, Respondent Alleges:

I.

That said deceased was, on the 15th day of June, 1949, a Civil Service employee of the respondent, and the remedy of libelant for the death of said Paul D. Vatuone is governed by the provisions of the United States Employees' Compensation Act, 1916, as amended (5 USC 751, et seq.), which statute is exclusive.

As and for a Second Separate and Distinct Defense to the Libel on File Herein, Respondent Alleges:

I.

That the accident resulting in the death of Paul D. Vatuone was not caused by any carelessness or negligence on the part of any of the officers, representatives, agents or employees of the respondent.

As and for a Third Separate and Distinct Defense to the Libel on File Herein, Respondent Alleges:

I.

That Paul D. Vatuone, at the time of said accident and death, was a Civil Service employee of respondent.

II.

That subsequent to his death, and prior to the filing of this libel, to wit, on June 28, 1949, the alleged heirs at law of said Paul D. Vatuone, on whose behalf this libel is brought, pursuant to the United States Employees' Compensation Act of 1916, as amended (5 USC 751, et seq.), filed a claim for compensation by reason of said death, with the Bureau of Employees' Compensation of the Federal Security Agency; that on August 3, 1949, an award of compensation was made to said claimants by the Bureau of Employees' Compensation in the amount and for the period fixed by statute.

III.

That by virtue of the aforesaid claim and award of compensation in accordance with said Act, the said alleged heirs at law, in whose behalf the libel is brought, have elected to receive compensation for said death, pursuant to said Act, and libelant is therefore barred from pursuing in their behalf any other remedy there may be on account of said death.

As and for a Fourth Separate and Distinct Defense to the Libel on File Herein, Respondent Alleges:

I.

That at the time and place of said accident, said Paul D. Vatuone was careless and negligent in the manner in which he was performing his services aboard said vessel; that said carelessness and negli-

gence proximately caused and proximately contributed to cause the injuries resulting in the death of said Paul D. Vatuone.

Wherefore, respondent prays that the libel be dismissed, and that respondent have its costs of suit, and such other and further relief as may be meet and proper in the premises.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney.

/s/ ANTOINETTE E. MORGAN,
Assistant U. S. Attorney,
Proctors for Respondent.

[Endorsed]: Filed January 3, 1950.

[Title of District Court and Cause.]

MEMORANDUM OPINION AND ORDER

Rina Vatuone, administratrix of the estate of Paul D. Vatuone, has brought an action against the United States for the death of her husband, who was injured while engaged as a rigger on board the USAT General D. E. Aultman, a public vessel of the United States owned and operated by the United States. Decedent, Paul Vatuone, was a civilian employee of the United States working for the Department of the Army under the authority of the Secretary of the Army, in accordance with

civil service regulations. He was a rigger in the water division, maintenance and repair branch, Shop Section, Fort Mason, San Francisco, California.

The government contends, first, that libelant's claim is barred because the United States Employees' Compensation Act is exclusive as to all employees of the United States covered by the Act. Respondent contends, second, that the claim is barred under provisions of 46 U.S.C.A. 742 and 789 under which the United States is entitled to all exemptions and limitations of liability accorded to owners, charterers, operators or agents of vessels whereby the provisions of the Longshoremen's and Harbor Workers' Compensation Act are exclusive. The government asserts, third, that libelant has invoked her claim under the Employees' Compensation Act and is therefore barred from pursuing her remedy, if any, under the Public Vessels Act.

With respect to the Government's contention that libelant's claim is limited to an award under the Employees' Compensation Act, this court has recently held that one in libelant's position may elect her remedy if suit was commenced prior to the amendment to the Employees' Compensation Act. (*Gibbs v. United States*, No. 25255; *Wright v. United States*, No. 25301. See also *United States v. Marine*, 155 F. 2d 456.) These decisions also dispose of respondent's contention advanced under 46 U.S.C.A. 742 and 789.

The sequence of events in Mrs. Vatuone's case

demonstrates that she commenced her libel under the Public Vessels Act after she had filed her claim but before an award was made by the government. She returned her check in the amount of \$137.28 to the government when it arrived and at no time did she accept any compensation. These facts place the instance case within the language of *Mandel v. United States*, 74 F. Supp. 754, wherein the court said:

“* * * I feel that only actual acceptance of compensation under this Act extinguishes the remedy sought here.”

Libelant did not accept compensation and is entitled to enforce her rights against the United States under the Public Vessels Act.

Accordingly, and based on the evidence adduced at the trial, the Court awards libelant damages in the amount of \$40,000, together with costs. Libelant to prepare findings consistent with this decree. The government's motion to dismiss the libel is denied.

Dated: December 20, 1950.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed December 20, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause came on regularly for trial on the 25th day of May, 1950, and on the 6th and 7th days of June, 1950, before the Court without a jury, and Ryan & Ryan by Thomas C. Ryan and Robert McMahon appearing as attorneys for the libelant, and Honorable Frank J. Hennessy, United States Attorney; C. Elmer Collett, and Antoinette E. Morgan, Assistant United States Attorneys, by C. Elmer Collett appearing as attorneys for respondent, and the matter having been submitted on briefs and from the evidence introduced, the Court finds the facts as follows, to wit:

I.

That on the 12th day of July, 1949, libelant was duly and regularly appointed administratrix of the Estate of Paul D. Vatuone, deceased, by the Superior Court of the State of California, in and for the City and County of San Francisco; that she thereupon duly qualified as such administratrix of said estate, and ever since such time has been and now is the duly appointed, qualified and acting administratrix of the Estate of Paul D. Vatuone, deceased.

II.

That libelant is a resident of the City and County of San Francisco, State of California.

III.

That respondent, United States of America, is a sovereign nation.

IV.

That this action is brought under the provisions of the Public Vessels Act, 46 U.S.C.A., 781, et seq.

V.

That respondent at all times herein mentioned was the owner and operator of the United States Army Transport "General D. E. Aultman," which vessel was at all times herein mentioned owned, operated and engaged by respondent as a public vessel as defined in the Public Vessels Act of 1925, 46 U.S.C.A., Section 781, et seq., and said vessel was employed by respondent in the operations and business of the United States Army Transport Service.

VI.

That on the 15th day of June, 1949, said vessel was in navigable waters in the United States, alongside a dock at Oakland, California; that at said time, Paul D. Vatuone was an employee of respondent, employed by it as a rigger in the marine repair shop of the United States Army Transport Service at San Francisco Port of Embarkation, Fort Mason, San Francisco, California, and was directed by respondent to go on board said vessel and to do certain repair work thereon; that in the course of his employment, said Paul D. Vatuone, along with other workmen of respondent, were engaged in replacing a shiv on one of the davits of Lifeboat No. 5 on said

vessel; that in the course of said work said Paul D. Vatuone and another workman were manually winding a cable around the drum of the winch which operated said No. 5 Lifeboat; that at said time and place the respondent carelessly and negligently put in operation the motor operating said winch so that said winch suddenly and very swiftly revolved around and the handle of said winch struck said decedent with such force that he was thrown violently to the deck and was killed.

VII.

That said decedent left surviving him libelant herein, who is his widow of the age of thirty-eight years, and a daughter named Paulette Teresa Vatuone, age seven years; that said parties are the sole heirs at law of said decedent; that each of them was wholly dependent upon said decedent for support; that this libel was brought for and on behalf of said heirs of said decedent; that at the time of his death said decedent was of the age of forty-four years and was in good health and was earning approximately \$250.00 a month.

VIII.

That it is not true, as set forth in the third separate defense of the answer filed on behalf of the respondent, that libelant herein elected to receive compensation for the death of her husband pursuant to the United States Employees' Compensation Act of 1916, as amended (5 USCA 751, et seq.). On the contrary, it is a fact that said libelant elected to

bring this present action under the provisions of the Public Vessels Act (46 USCA 781, et seq.).

IX.

That it is not true, as set forth in the fourth separate and distinct defense to said libel set forth in the answer of respondent herein, that said Paul D. Vatuone was careless and negligent in the manner in which he was performing his services aboard said vessel on the day of said accident.

X.

That by reason of the premises libelant and her daughter, Paulette Teresa Vatuone, a minor, have been damaged in the sum of Forty Thousand Dollars (\$40,000.00).

As a Conclusion of Law from the foregoing facts, the Court finds that libelant is entitled to a decree against respondent in the sum of Forty Thousand Dollars (\$40,000.00) and costs of suit, and it is ordered that a decree be entered accordingly.

Dated: Dec. 29, 1950.

/s/ GEORGE B. HARRIS,

Judge of the United States
District Court.

Receipt of copy acknowledged.

[Endorsed]: Filed December 29, 1950.

In the United States District Court for the Northern
District of California, Southern Division

No. 25476

RINA MARIA VATUONE, as Administratrix of
the ESTATE OF PAUL D. VATUONE, De-
ceased,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

DECREE FOR DAMAGES

This cause came on regularly for trial, before the Court sitting without a jury, on the 25th day of May, 1950 and the 6th and 7th days of June, 1950, Messrs. Ryan & Ryan by Thomas C. Ryan and Robert McMahon appeared as attorneys for the libelant, and Honorable Frank J. Hennessy, United States Attorney, C. Elmer Collett and Antoinette E. Morgan, Assistant United States Attorneys, by C. Elmer Collett, appeared as attorneys for the respondent, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the Court being fully advised in the premises, and having filed herein its findings of fact and conclusions of law, and having directed that a decree be entered in accordance therewith;

Now, Therefore, by reason of the law and findings aforesaid:

It Is Hereby Ordered, Adjudged and Decreed:

I.

That libelant have a decree against the respondent in the sum of Forty Thousand Dollars (\$40,000.00), with interest thereon at the rate of 4% per annum from the date hereof until paid.

II.

That libelant have a decree against respondent for her costs herein, taxed at \$206.93.

Dated this 29th day of December, 1950.

/s/ GEORGE B. HARRIS,
Judge of the United States
District Court.

[Endorsed]: Filed December 29, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Rina Maria Vatuone, Administratrix of the Estate of Paul D. Vatuone, deceased, and her Proctors, Messrs. Ryan & Ryan, and Robert McMahon:

Notice Is Hereby Given that the United States of America, Respondent herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from each and every part of the final judgment and the decree entered in this cause on December 29, 1950, in favor of Libelant and against Respond-

ent, as more fully set forth in said Respondent's assignments of error filed herewith.

Dated: This 26th day of March, 1951.

/s/ FRANK J. HENNESSY,
United States Attorney,
Proctor for Respondent.

[Endorsed]: Filed March 26, 1951.

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable Judges of the Above-Entitled
Court:

Respondent, United States of America, in the above-entitled cause, by and through Frank J. Hennessy, United States Attorney, being aggrieved by that certain final order, to wit, the judgment and decree filed and entered in the above cause on December 29, 1950, hereby claims an appeal therefrom and from the whole thereof, to the United States Court of Appeals for the Ninth Circuit, and prays that such appeal be allowed forthwith.

Dated: This 26th day of March, 1951.

/s/ FRANK J. HENNESSY,
United States Attorney,
Proctor for Respondent.

[Endorsed]: Filed March 26, 1951.

[Title of District Court and Cause.]

ORDER GRANTING PETITION FOR APPEAL

The above-entitled cause having duly and regularly come on for hearing before the above-entitled court, the undersigned Judge presiding, upon petition for appeal of Respondent United States of America duly presented to this court, together with the said Respondent's assignments of error heretofore filed with the Clerk of this court, and the court having considered the same; and it appearing to the court that notice of appeal was duly and timely filed herein on March 26, 1951; now, therefore,

It Is Hereby Ordered that an appeal to the United States Court of Appeals for the Ninth Circuit from the judgment and decree heretofore entered and filed on the 29th day of December, 1950, in the above-entitled cause, be and the same is hereby allowed.

It is Further Ordered that the Respondent United States of America is not required to file cost and supersedeas bond on appeal, and that stay of execution is hereby entered and granted.

Done in open Court this 26th day of March, 1951.

/s/ GEORGE B. HARRIS,

United States District Judge.

[Endorsed]: Filed March 26, 1951.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS BY RESPONDENT UNITED STATES OF AMERICA

Respondent, United States of America, hereby assigns error in the proceedings, orders, decisions and judgment of the District Court in the above-entitled action, and in the Findings of Fact, Conclusions of Law, and Judgment and Decree entered and filed on the 29th day of December, 1950, as follows:

1. That the Court erred in finding that libelant herein did not elect to receive compensation for the death of her husband pursuant to the United States Federal Employees' Compensation Act of 1916, as amended. (5 U.S.C. 751, et seq.) (Findings of Fact VIII).

2. That the Court erred in finding that libelant elected to bring this present action under the provisions of the Public Vessels Act. (46 U.S.C.A. 781, et seq.) (Findings of Fact VIII).

3. That the Court erred in finding that respondent was negligent. (Findings of Fact VI).

4. That the Court erred in failing to find that prior to the institution of this suit the heirs at law of Paul D. Vatuone, on whose behalf the libel herein was brought, elected to receive and accept compensation for the death of Paul D. Vatuone pursuant to the United States Employees' Compensation Act of 1916, as amended. (5 U.S.C. 751, et seq.)

5. That the Court erred in making and entering its Conclusions of Law and Order for Judgment that libelant is entitled to a decree against respondent in the sum of \$40,000.00, or in any other sum.

6. That the Court erred in entering a Final Decree on December 29, 1950, in favor of libelant in the sum of \$40,000.00, together with costs, or in any other sum in that,

(a) There was no proof or sufficient proof that respondent was negligent in any respect;

(b) The evidence establishes that prior to the institution of this suit the heirs at law of Paul D. Vatuone, on whose behalf the libel herein was brought, elected to receive and accept compensation for the death of Paul D. Vatuone pursuant to the United States Employees' Compensation Act of 1916, as amended. (5 U.S.C. 751, et seq.);

(c) At the time suit herein was instituted, as well as at all other times, the exclusive right or remedy against respondent available to libelant on behalf of the heirs at law of Paul D. Vatuone, on account of the latter's death, was that provided by the United States Employees' Compensation Act of 1916, as amended. (5 U.S.C. 751, et seq.)

(d) Libelant is not entitled to maintain suit herein against respondent under the Public Vessels Act, 46 U.S.C.A. 781, et seq.) the United States not having consented to suit thereunder to recover damages on account of injury or death to an employee of the United States for

which a remedy is provided by the United States Employees' Compensation Act of 1916, as amended. (5 U.S.C. 751, et seq.);

(e) A decree should have been entered in favor of respondent dismissing the libel and awarding the respondent its costs.

/s/ FRANK J. HENNESSY,
United States Attorney,
Proctor for Respondent.

[Endorsed]: Filed March 26, 1951.

[Title of District Court and Cause.]

CITATION ON APPEAL

The President of the United States to the above-named Libelant, Rina Maria Vatuone, as Administratrix of the Estate of Paul D. Vatuone, deceased.

Greetings:

You are hereby notified that in that certain cause in Admiralty in the United States District Court for the Northern District of California, Southern Division, as entitled above, wherein Rina Maria Vatuone, as Administratrix of the Estate of Paul D. Vatuone, deceased, is libelant, and the United States of America is respondent, an appeal has been allowed by order of this Court to the United States Court of Appeals for the Ninth Circuit, upon the petition of the respondent therefor.

You are hereby cited and admonished to be and appear in the United States Court of Appeals for the Ninth Circuit in San Francisco, in the State of California, within forty (40) days from the date of this citation pursuant to an appeal allowed in the above-entitled cause on the 26th day of March, 1951, to show cause, if any there be, why the final decree as entered in the above-entitled cause, upon such appeal above mentioned, should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable George B. Harris, Judge of the United States District Court for the Northern District of California, Southern Division, this 26th day of March, 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed March 26, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of California,
City and County of San Francisco—ss.

Helen Vale, being sworn, says that she is a citizen of the United States, over 18 years of age, a resident of the City and County of San Francisco, State of California, and not a party to the within action; that affiant's business address is 422 Post

Office Building, San Francisco, California; that affiant served a copy of Notice of Appeal, Petition for Appeal, Order Granting Petition for Appeal, Citation on Appeal, and Assignment of Errors by Respondent United States of America, the originals of which were filed in the above-entitled cause on March 26, 1951, by placing said copies in an envelope addressed to: Messrs. Ryan & Ryan and Robert McMahon, Attorneys at Law, 800 Phelan Building, San Francisco 2, California, which envelope was then sealed and duly and properly franked for mailing without postage, and thereafter, on March 26, 1951, deposited in the United States mail at San Francisco, California; that there is delivery service by United States mail at the place so addressed, and regular communication by United States mail between the place of mailing and the place so addressed.

/s/ HELEN VALE.

Subscribed and sworn to before me this 27th day of March, 1951.

[Seal] /s/ L. C. JACOBSEN,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed March 27, 1951.

[Title of District Court and Cause.]

RESPONDENT'S DESIGNATION OF APOSTLES ON APPEAL AND PRAECIPE THEREFOR

To: Ryan & Ryan and Robert McMahon, 800 Phelan Building, San Francisco 2, California, Proctors for Libelant, and to C. W. Calbreath, Clerk of the United States District Court for the Northern District of California:

Respondent hereby designates and requests that the record on appeal in the above entitled action shall include:

1. The Libel;
2. Answer to the Libel;
3. The Reporter's Transcript of Testimony as taken on the part of the libelant, and all Exhibits introduced by libelant not annexed to the Libel;
4. The Reporter's Transcript of Testimony as taken on the part of the Respondent, and all Exhibits not annexed to its pleading.
5. Memorandum Opinion and Order of the Court, filed herein on December 20, 1950.
6. Findings of Fact and Conclusions of Law entered by the Court herein;
7. Final Decree entered by the Court herein;
8. Notice of Appeal;
9. Petition for and Order Granting Appeal;

10. Assignments of Error;
11. Citation on Appeal;
12. Affidavit of service by mail of Notice of Appeal, Petition for and Order Granting Appeal, Citation on Appeal, and Assignments of Error;
13. Praecipe for Apostles on Appeal.

/s/ FRANK J. HENNESSY,
United States Attorney, Proctor for Respondent
United States of America.

Affidavit of Service by Mail attached.

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REPORTER'S TRANSCRIPT

Thursday, May 25, 1950

Appearances:

For Libelant:

THOMAS C. RYAN, Esq.

For Respondent:

C. ELMER COLLETT, Esq.

Mr. Collett: Ready, your Honor.

Mr. Ryan: Ready.

The Court: Will you state the issues, gentlemen, please?

Mr. Ryan: Yes, your Honor. May it please your Honor, on June 15, 1949, Paul Vatuone was employed as a rigger by the United States Government at Fort Mason here in San Francisco. He

was injured on board a United States Army transport that was along side a dock at the Army Base in Oakland, California. He, along with other riggers and mechanics and workmen from Fort Mason were ordered by the Government to go on board this transport, the General Altman, in order to repair part of the lines and the block and tackles on lifeboat number 5. It seems that there was shiv on that lifeboat that had to be replaced.

The Court: What is a shiv?

Mr. Ryan: You know where lines go through a pulley effect?

The Court: Yes.

Mr. Ryan: And it had to be replaced. At the time of the accident here was what was happening. There was a lifeboat drill taking place there for all the lifeboats on that deck except No. 5 that the men were working on, and at the time that a lifeboat drill is taking place ship's electrician is required to stand by an electrical panel so that in case of emergency he can pull the electricity and prevent any accidents.

The Court: A switch? [2*]

Mr. Ryan: Pull a switch, yes. On the day of the accident what was happening was this: First of all, lifeboat No. 5 was up in the cradle, in the davits and it was blocked up there by wood and other means so it couldn't roll. And these men had a cable on the deck and had the cable wound around through another shiv down to the drum of the winch. What they were trying to do at the time of the acci-

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

dent, they were winding by hand this cable onto the drum of the winch. Under ordinary circumstances, usually that can be wound by hand until they come to about one-third of the cable. To use their expression, until the cable sets itself. Then they ask for power to wind it the rest of the two-thirds by power.

In order to do this they had a crank shaped something like this (demonstrating at blackboard), a steel crank shaped like that which fit into a groove at the side of the winch. The top of it was about thirty inches wide, and usually two men would be side by side. It is very hard work. They would be winding it in that fashion, and the gear ratio was such you had to make maybe ten or fifteen turns of that crank to make one revolution of the drum. It is very hard work to do that by hand.

Well, when the work had gone on to a point where they had about one-third of it on the drum, Bill or one of the others—the testimony is a little confusing as to who went to the electrician and asked him if he would furnish power so that they [3] could wind the rest of the two-thirds of the cable by electric power.

When the lifeboat is being raised, gets up to the crib pulley, as they call it, they have what they call a limit switch there that automatically stops everything so that the boat doesn't go clear through there. He apparently tried that and said, "No, that won't work." Then they have another switch near that winch called the dead man's switch, where you keep your hand on that switch all the time to

keep it going and if you take your hand off it stops so that it isn't working. So he said, "No, I can't give you any power because the lifeboat is already up in its nest and we can't have power." The men then said to him, "Oh, all right. Is it all right to keep on winding the rest of the way by hand?" He said, "Oh, sure, sure, go ahead and do that."

So here is how this accident happened. Vatuone was on the inside and another man on the outside, and they were laboriously going like that (indicating) when all of a sudden the motor started and this coil spun around like that, and Vatuone apparently was caught and lifted about nineteen feet in the air, and we have evidence he made a dive and landed on deck on his head. He never did regain consciousness and died the same day.

Here is our theory as to how this accident happened. Immediately they had an investigation. The equipment was [4] installed by the White House Electric Company. The White House men or engineers came down shortly and tested the electrical equipment from source to finish, and the electric power that operated the No. 5 winch was found in perfect working order. The White House people will testify there was only one way in the world for that motor to start, and that was for a person to put on the switch running No. 5 motor on that panel. We took a deposition of such electrician—

The Court: What about the dead man switch? Do you have to keep compression on there?

Mr. Ryan: Yes. That wouldn't work at all unless you had power on.

The Court: That is another avenue of approach.

Mr. Ryan: It could not be turned on at the panel where they had all the switches.

The Court: All right.

Mr. Ryan: We will show you this. We took the deposition of the electrician, of course. According to the theory of the White House man he was the man at fault. He said this. First, we had a statement from him shortly after the accident. We employed Mr. Dan Powers to make an investigation for us.

The Court: What is the visibility situation between the post of the electrician and the operation you have described?

Mr. Ryan: They were thirty feet away on the same deck to one side of the men working on it. [5]

The Court: Any equipment, any paraphernalia that might have obstructed the view?

Mr. Ryan: Nothing. The deposition of the electrician will show. He admits he could see the men. A statement was taken from him first in which he said he stands right at the panel during the whole time of lifeboat drills. He said he may have turned it on and then he says in his statement he turned it off. But no matter what happened, almost immediately after he did something he saw a man lying on the deck.

The Court: What is your estimate of the time in which the motor may have been in operation? What is your estimate of the time?

Mr. Ryan: Oh, it was only in operation for maybe ten or fifteen seconds

The Court: What stopped the operation?

Mr. Ryan: The electrician claims he stopped it by pulling the switch for the No. 5 motor, which he says was on, although he denies he put it on in his deposition. He admits he was there all the time, but denies——

The Court: He admitted he stopped it?

Mr. Ryan: He admitted he stopped it, yes, sir. The man Paul D. Vatuone was 44 years of age at the time of his death. He left his wife who was 37 at the time of his death, and a little girl, Pauline Vatuone, who was 7 years of age at the time of his death. He had worked out at Fort Mason for the [6] Government since 1940, a period of almost nine years; not continuously, however, but at the time of the accident in 1949 he was working for the Government and earning from the Government during 1949 some \$256 or \$60 a month. That is his average. Then to augment that income, during the last two months of his life, May and June, 1949, he worked at a liquor store on Chesnut Street at night. Between the two incomes he was earning a little more than \$300 a month. Later on, your Honor, we will argue and I will present the question of present value of future earnings and life expectancy, and so forth.

This action is brought under the provisions of the Public Vessels Act, this transport being a public vessel of the United States, which was incorporated in the Suits in Admiralty Act. Your Honor has had several of these cases. I know you had Hanz against the United States.

The Court: I have had several cases.

Mr. Ryan: And Simmons and Rubens against the United States. Incidentally this right of action has been taken away from employees of the United States by the act of October 14, 1949. However, that very act provides that it would not affect suits that were already in existence. I think counsel has all the books. I am prepared for that and might as well give your Honor it.

The Court: Have the legal issues been disposed of on [7] motion?

Mr. Ryan: No.

The Court: Pre-trial motion or anything of the kind?

Mr. Ryan: No, never anything like that. We have this problem, for instance: That claim he made allows you to accept compensation rather than to bring a suit for damages. I better tell your Honor the facts in that regard generally.

It seems that immediately after the man was hurt his wife was notified that he was out at Marine Hospital and he died that very day. At the Marine Hospital they told her she should get in touch with a Mr. Sutherland at Fort Mason, and she got in touch with him by phone and he said, "Come on down to the office and I will take care of everything in regard to compensation," so she went down there and he explained it to her this way: "You are entitled to compensation against the Government and also entitled to bring a suit for damages. However," he said, "if you bring a suit for damages, whatever

compensation is paid you must be deducted from the amount you receive.”

Well, she wanted to bring suit for damages, and she believed that, she had an application for compensation. Now, about three days later she saw Mr. McMann, the attorney who was proctor for the libellant, and he advised her she had to make a determination. She said she wanted to proceed by way of suit for damages. Immediately, on July 23rd, 1949, [8] before compensation order was made, Mr. McMann sent a telegram to the Employee's Compensation Department in Washington and he said, “Please stop immediately.”

The Court: Pardon me one moment. I notice on page 3 an allegation in the answer that, “An award of compensation was made to said claimants by the Bureau of Employee's Compensation in the amount and for the period fixed by statute.” You might address yourself to that.

Mr. Ryan: That is what I am doing, coming to that point. That is August 3rd. It was on July 23rd Mr. McMann said, “Please cancel *Mr. Vatuone's* application for compensation because she elects to proceed by way of damage suit rather than accepting compensation.” Furthermore, we filed this suit on August 1st, 1949, before that compensation order was made. Furthermore, at the very date that the suit was filed (and I think the file will show this) we served a copy of the proclamation of administrator on the United States Attorney here in San Francisco, and on the same day we sent by registered mail to the Attorney General in Washington a

copy of the complaint in that action. Then after we took all these processes the board in Washington made its order of compensation on August 3rd and sent two checks out which *Mr. Vatuone* did not accept.

The Court: What is the procedure in making those awards? Is it a very formal matter? [9]

Mr. Collett: I have the entire record here, if your Honor please.

The Court: Thank you.

Mr. Ryan: Formal application was made, and afterwards——

The Court: Your theory is that notice of the termination was given prior to the making and entry of an order?

Mr. Ryan: That is so. And furthermore, that she never accepted—I think that is an important part of the matter—she never accepted compensation because two checks were sent out and she didn't cash either of them. She sent them back to Washington with a letter which I prepared and she signed underneath it she had already made her determination to proceed by way of suit for damages and therefore was returning the check, asked them please not to send any more and they never did.

The Court: Well, it is a legal issue, not fact.

Mr. Ryan: Yes.

Mr. Collett: Mr. Ryan, may we admit the amount of that check at this time—those checks that were received and sent back?

Mr. Ryan: Yes. I believe one was \$198 and some cents and \$78, I think. That is one legal issue. The

other legal issue was the right to sue the United States of an employee, and the third is whether the amendment of 1949 took away her right. [10]

Mr. Collett: I will state the issue of the defense hereafter, your Honor.

Mr. Ryan: I have prepared a brief on the law on those three issues, for your Honor's assistance. Here is a copy for you, Mr. Collett.

Mr. Collett: Are you finished?

Mr. Ryan: Yes.

Mr. Collett: If the Court please, this is an action by an Employee of the United States where it is admitted he was employed shore side. He is not a seaman. This is a case of a repairman who goes on board a ship the only difference from all those cases in which it was held if the individual is not a seaman it doesn't come within the meaning of the Sieracki case in that he is an employee of the United States It is important to keep that in mind. This man is an employee of the United States.

Now, there are, I would say, three issues to which we direct our attention legally. First, the problem that the United States in the compensation act has provided an exclusive remedy as to any such case as this regardless of any other enactment. Second, notwithstanding the compensation act, that do to the fact that the longshore harbor workers compensation act provides exclusive action, and in Section 740, Title 46, provides that the United States is not liable to any greater extent than is any private concern, that the [11] exclusive remedy as to this individual is right in the compensation act.

The Court: Under the longshoremen's act may well be a reduction to the amount of any recovery in another forum. I went through that a very involved case, the name of which escapes me presently, but I went through the matter elaborately in that Perello case. You are more familiar currently with these matters than I am.

Mr. Collett: The Court hasn't gotten my point. There is no question under the Perello act that the stevedore has a right to sue a third person. But we have a situation here in which the United States is the employer of this individual.

The Court: What is Brady Steamship case?

Mr. Collett: It was a case in which the question of the agent was involved, the question as to whether or not the agent's negligence itself was the injury, then he might be sued for that, but if it was merely for the performance of duty that the agent cannot be sued. But here we have a situation in which the longshoreman's and harbor workers act expressly provides that as to his employer—and the Sieracki case repeats it and recognizes it—all cases recognize that as to his employer the longshoremen's harbor workers compensation act is the exclusive remedy. The United States is the employer of this man. Now, the longshoremen's harbor workers compensation act in so many words states that [12] the compensation is not applicable to an employee or officer of the United States. I call your Honor's attention to that forthwith.

The Court: Why were these matters reserved

until trial time? Could they not be disposed of by preliminaries?

Mr. Collett: The matter of this compensation, if your Honor please, is one I have had before Judge Goodman for some time because it is involved in the Banks case, Buckner case, this case, and——

The Court: You see, I have been out in another world, another stratosphere so long, I want to bring myself up to date about these.

Mr. Collett: The only evidence of general concern with which your Honor has not had some familiarity in these cases, we did finally have the matter as to the compensation problem presented to Judge Goodman, and it was presented two weeks ago last Monday in the Banks case, and all the documents necessary with regard to compensation were presented to the Judge and the Judge dismissed the complaint. In that particular case the compensation had been received and been accepted.

The Court: In that case there had been acceptance of the award and consummation of the transaction, is that right?

Mr. Collett: That is right. The money had been received. These cases have all fitted into the problem. At some point some Court is going to hold on the compensation question itself [13] where the line is to be drawn.

The Court: Then I approach this as a problem of some novelty to these Courts.

Mr. Collett: That is right.

The Court: I always seem to have these cases of first impression.

Mr. Collett: In developing this case we followed along after the Banks case, but the switch to Judge Erskine, he simply put them at the bottom and it wasn't possible to raise matters of law. Also it depended on receiving necessary documents from Washington.

The Court: I appreciate your comment because it is difficult for me to understand why you approach a trial of this extent without having first some kind of matters tried in advance, but I understand.

Mr. Collett: If I might again make myself——

The Court: I understand the issues.

Mr. Collett: You have the issues first, of course, the references to a Fifth Circuit case, Posey vs. TVA in which the compensation was held to be exclusive. U. S. vs. Lawrence, Fourth Circuit. This Court and this district, the _____ case. Your Honor, I should say the Lawson case, Smith case, all involving seamen.

The Court: Well, we will have that at some appropriate step, Mr. Collett. All those cases are reviewed. [14] I certainly wouldn't assume now, at the threshold, to undertake a determination of the basic legal question. I will reserve my ruling. If you make your motion now to dismiss the complaint on the ground that the administrator herein of the estate of the deceased elected under the law as announced and that that election was exclusive, under the circumstances, I will reserve my ruling until the conclusion of the testimony.

Mr. Collett: Well, the matter in the Banks case,

counsel was trying to reach this particular and Judge Goodman, if he had continued with the calendar would have set the issues separately. I think it is relatively a simple matter on the second point in that the United States has not consented to be sued in this action because the compensation act is exclusive by reason of the act.

The Court: Well, on that longshoreman's act, I can't at this juncture—bear in mind it has been months and months since I reviewed these authorities—I can't at this juncture adopt the same parity of recollection. I read the longshoreman's act in connection with a case presented by Mr. Resner, a jury trial. At that time I read the longshoreman's act, and in that case I tried the question arose with respect to acceptance of compensation under the longshoreman's act. The defendant explained the respondent had accepted the payments under the longshoreman's act, several payments.

Mr. Collett: Yes, they were set off. No question about [15] that situation. The law is clear a longshoreman has a right to sue a third person. There is no question about that. You can go down the line of all the cases, as against a third person, no question about that. But the act expressly provides—I am reading 905 of Title 33—(reading). No question. In the Sieracki case the Supreme Court recognizes that. But we have a situation here in which the United States is the employer of this particular individual and is also the owner and operator of this particular ship.

Mr. Ryan: May I interrupt. In line with your

Honor's suggestion, I have several witnesses who are very short, and if we could reserve decision on this matter I would like to argue it much more fully.

The Court: I am trying to assimilate the law at one fell swoop and sometimes it is difficult. Appreciation should be had, Mr. Collett, you are pretty filled with your subject. And I am happy and gratified to see you so filled with your subject because there were many months when we didn't have anyone at all filled with any kind of subject in Admiralty in this Court and particularly concerned about conditions; but I am happy to see the avidity with which you approach the subject. However, I say to you, Mr. Collett, if you intend to present a motion to dismiss and ask a ruling at this juncture, I would like to reserve judgment until, using the language of my distinguished colleague, the Honorable Judge [16] Goodman, "Until the broad vistas of the litigation are finally before." We will take a short recess.

(Thereupon a short recess was taken.)

(Further legal arguments reported but not transcribed.)

Mr. Collett: I move to dismiss the action on the ground that the remedy of this particular individual, the libelant, in accordance with the provisions of Title 46—746, Title 33, longshoreman's and harbor workers act, as well as the provisions of Title 5 of the Employee's Compensation Act, that the remedy

herein was exclusive and that the maintenance of this action is barred.

The Court: Well, at best your motion concerns itself with law and fact under the theory that the election was consummated, so under the circumstances it would require the Court to take testimony. Secondly, the Court perceives that many other pieces of litigation are affected by this ruling, and under the circumstances the Court will reserve ruling on the motion to dismiss until the conclusion of the testimony and taking of the testimony.

Mr. Collett: The Court has in mind that a portion of that motion is devoted to three phases of it, that is, the compensation act is exclusive in itself—

The Court: Yes, as a matter of law.

Mr. Collett: Yes. And two reasons, because of itself and because of Section 746 wherein the United States has not [17] consented and not waived sovereign immunity to be sued, and on that point courts have all been very uniform in that the presumption is against suability. That the act must be strictly construed and not extended in liability.

The Court: I recognize your argument, counsel, and the Court will reserve ruling until the conclusion of the taking of the testimony.

Mr. Ryan: Shall I proceed?

The Court: It is now twelve o'clock. You might have the witness sworn, if you wish, and go through the preliminaries so we will be able to go right ahead.

JOHN HARRIS

the witness called on behalf of the Plaintiff being first duly sworn testified as follows:

Direct Examination

By Mr. Ryan:

Q. What is your name, please?

A. John Harris.

The Court: Your occupation, Mr. Harris?

A. Machinist, sir.

The Court: All right, we have now reached the twelve o'clock noon hour.

Mr. Ryan: Your Honor, may I have an order of the Court ordering these witnesses to return at 2:00 o'clock?

The Court: All witnesses who have been summoned to appear in this case are now excused until 2:00 o'clock. You are to [18] return at 2:00 o'clock without further order or notice. 2:00 o'clock this afternoon.

The Court: Recess until 2:00 o'clock.

(Thereupon the Court was adjourned to the hour of 2:00 o'clock p.m.) [19]

Thursday, May 25, 1950, 2:00 P.M.

JOHN HARRIS

resumed stand being previously duly sworn testified further as follows:

The Clerk: The witness on the stand is John Harris, heretofore sworn.

(Testimony of John Harris.)

Direct Examination

(Continued)

By Mr. Ryan:

Q. Mr. Harris, I believe you stated before lunch time you were a machinist, is that correct?

A. That is right.

Q. By whom are you employed?

A. By the Government at Fort Mason.

Q. How long have you been employed by them?

A. Nine years.

Q. Do you recall the accident that occurred to Mr. Vatuone on June 15, 1949?

A. I do, sir.

Q. What vessel did that occur on?

A. The Aultman.

Q. Is that United States Army Transport General D. E. Aultman? A. That is right, sir.

Q. Were you the foreman in charge of work that was going on there at that time?

A. I was.

Q. What type of work were you doing at the time of the accident?

A. We were changing a shiv that was sticking.

Q. First of all, you were changing a shiv on what?

A. On a lifeboat davit.

Q. And that was a lifeboat on the General Aultman, is that correct? A. Yes.

Q. Where was the General Aultman at the time?

A. She was at pier 4, Oakland Army Base.

(Testimony of John Harris.)

Q. Alongside of a dock? A. Yes, sir.

Q. What lifeboat were you working on?

A. No. 5.

Q. On what side of the ship is that?

A. Starboard.

Q. Was the starboard side alongside of the dock or away from the dock?

A. It was away from the dock.

Q. Where was No. 5 lifeboat situated as to being fore or aft on the vessel?

A. Well, it is pretty near midship. A little bit aft.

Q. How many lifeboats are on the starboard side of the Aultman?

A. Oh, about eight boats. There is two in a nest.

Q. When had you started this particular work?

A. Oh, around nine o'clock in the morning.

Q. I mean, the day before had you worked on it? [20]

A. The day before the accident, we started the job the day before the accident.

Q. Where do you men report to work?

A. Fort Mason.

Q. Were you all employees of the United States Army Transport Service? A. Yes, sir.

Q. Since that they have changed the name of it, haven't they? A. That is right.

Q. What do they call it now?

A. The MSTS. That is a branch of the Navy. The Navy took over all Army transportation.

Q. MSTS? What is that?

(Testimony of John Harris.)

A. Military Sea Transportation Service.

Q. When did that become effective, that change?

A. 1st of April, 1950.

Q. The day before this accident did the members of your crew, if we could call them that, start out from Fort Mason?

A. That is right, yes, sir.

Q. And how many men did you have in your crew or gang?

A. Well, I originally went over there with nine men.

Q. What classifications did they have? Were they machinists?

A. They were all qualified machinists.

Q. The day before then, was Vatuone one of the men that went over with you?

A. Yes, he started the job the day before. [21]

Q. So we understand the nature of the work that was going on, I have here a Treasury Department of the United States, United States Coast Guard Service manual for lifeboat and able seaman, and I show you a picture of a davit on page 20 and on page 21 a drawing of a lifeboat cradle and davit and I will ask you if that generally represents the situation that you were working on?

A. Yes, that represents it.

Mr. Ryan: I will show that to counsel. Oh, counsel has some pictures. That is better still. First of all, in view of the facts that the pictures just show part of the area I wish to show counsel, your Honor, this picture of the davit and the lifeboat

(Testimony of John Harris.)

and the cradle, just for illustration purposes purely. It may be of some help to your Honor.

The Court: It may be received for that purpose.

Mr. Ryan: Pages 20 and 21. I guess the book could go in evidence, couldn't it, your Honor?

The Court: Certainly.

The Clerk: Pages 20 and 21 of the book?

The Court: For the purpose of illustration.

(Pages 20 and 21 of the manual were marked Libelant's Exhibit 1 for identification.)

Q. (By Mr. Ryan): Now, that drawing shows a lifeboat cradle in its nest, doesn't it?

A. Yes, sir. Of course, they have two lifeboats nestled there. [22] There is one nestled inside of the lower boat.

Q. I see. Here is a picture counsel handed me taken September 15, 1949, showing a boat with No. 5 on the bottom of it. Does that look like the situation that existed on the Aultman? A. Yes, sir.

Mr. Ryan: I will introduce that in evidence and show it to your Honor.

Mr. Collett: No objection to the picture.

The Court: So ordered.

(The picture was marked Libelant's Exhibit 2 in evidence.)

Q. (By Mr. Ryan): As I understood your testimony—what was out of order? The shiv?

A. Yes, sir, a double shiv.

(Testimony of John Harris.)

Q. As I understand it, a shiv is like a pulley where a cable goes through, is that correct?

A. That is right. It is a guide for cables.

Q. So that you were going to replace that shiv with another shiv? A. Yes, sir, a new shiv.

Q. When you did that how did you keep lifeboat No. 5 in its place in the cradle after you had removed the cable?

A. Well, we have riggers. They go up there and use cable to strap the boats in the cradles so they won't drop down, and then they have a bar that keeps the boats on the cradle from rolling down the track. [23]

Q. Did you complete that work the day before this accident? A. Yes, sir.

Q. Did you have any more work to do the day of the accident, June 15, on that lifeboat No. 5 or its davits?

A. Yes, we had to re-run the cable.

Q. Would that be to run the cable to get it in a position where the winches would work the lifeboat up and down as you wanted it? A. Yes.

Mr. Collett: If the Court please——

Mr. Ryan: It is preliminary, your Honor.

Mr. Collett: I know, but he has spent a great deal of time about matters that I thought had some materiality. They don't. He has taken unnecessary time. And I want him to let the witness testify, ask questions and not testify himself.

Mr. Ryan: I will do that. We haven't got to the vital point as yet.

(Testimony of John Harris.)

Mr. Collett: Get to the point.

Q. (By Mr. Ryan): On the day of the accident, June 15, did Mr. Vatuone go over with you again from Fort Mason to this boat? A. He did.

Q. At the time or immediately before the accident what type of work was Mr. Vatuone doing?

A. He was assisting in putting the cable back on the drums. [24]

Q. Where was the cable?

A. It was lying on the deck.

Q. From the deck where did it go?

A. It went up through the shivs and on to the drum and then it was wrapped on the drum by hand.

Q. When you refer to the drum, you mean the drum of the No. 5 winch? A. That is right.

Q. Is that the winch that operates the No. 5 lifeboat? A. That is right.

Q. Now, how was Vatuone to wind the cable around the drum winch?

A. Well, he was standing, we will say, in the center of the crank facing aft, cranking it by hand.

Q. I show you a picture which counsel has shown me taken September 15, 1949, showing a man handling a crank. Is that the type of crank he was operating? A. Yes, sir.

Mr. Ryan: We offer this as our next exhibit, your Honor.

Mr. Collett: No objection.

The Court: It may be marked.

(Testimony of John Harris.)

(Picture was marked Libelant's Exhibit No. 3 in evidence.)

Mr. Ryan: I would like the Court to see that.

Q. (By Mr. Ryan): Now, at the time of the accident do you [25] know how much of the cable had been wound around the drum of No. 5 winch?

A. Oh, I would say about one-third.

Q. How many men were engaged in that work of operating that crank?

A. There was two men at the time. There was four riggers there. They were taking relays at it.

Q. Who were the four men that were working on the crank? A. They were riggers.

Q. Was Vatuone one of them?

A. Yes, he was one of them.

Q. Now, let me ask you this: While Vatuone and his fellow workers were operating that crank by hand was there any other activity taking place on that same deck in regard to the other lifeboat?

A. Yes, there was a lifeboat drill in process.

Q. When you say a lifeboat drill was in process, were all the other lifeboats you have mentioned save this one, No. 5, that was being repaired, in use?

A. They were lowering them overside, and then brought them back up and put them back in their nest.

Q. While Mr. Vatuone and his fellow workers were winding this crank was the motor on the No. 5 winch in operation or not in operation?

A. It wasn't in operation so far as the power was concerned. [26]

(Testimony of John Harris.)

Q. That is what I want to find out, yes. Do you know anything about this proposition: Is that fast or slow work, winding that cable on the drum?

A. According to the gear ratio, it is very slow.

Q. Why is that?

A. I imagine it is because of the weight.

Mr. Collett: I object to his imagination, if the Court please. A. Well, the weight.

Q. (By Mr. Ryan): Can you turn that easily or is it hard work to turn it?

A. Oh, it is labor to turn it, hard work.

Q. Do you know anything about this, about the ratio or how many turns at the crank in order to get one revolution of the drum?

A. Fifteen to twenty.

Q. How long had Mr. Vatuone and his fellow workers been winding that cable the morning of the accident before the accident happened?

A. An hour and a half.

Q. I see. All right. In that hour and a half they had succeeded in winding one-third of the cable?

A. Well they weren't winding the whole hour and a half. They had been winding, actually, they wound about, I would say, forty-five minutes. [27]

Q. When you say they had wound about one-third of the cable, how long was the cable that they had to wind?

A. I wouldn't know what the length of the cable was.

Q. Well, I don't mean accurately, but give us an approximation if you can.

(Testimony of John Harris.)

A. It would be 100 feet.

Q. How big was the cable, by the way?

A. Five-eighths.

Q. Five-eighths inch cable? Now please tell his Honor what you know about this accident? Tell him where you were and what you were doing.

A. I was standing aft of the winch facing towards the port of the ship. I was directing two men to take some shivs down below. Then I heard this commotion or whirl of the motor as it started up, and I heard some men hollering, and when I turned I seen—the moment I turned around I found Mr. Vatuone in the—he seemed to be in the air, then his head hit the deck.

Q. Was his head the first portion of his body to hit the deck? A. Yes, sir.

Q. What type of deck was it?

A. It was a steel deck.

Q. Let me ask you this: Immediately before you saw Mr. Vatuone go through the air and light on the reck, what had he [28] been doing so far as you observed?

A. Cranking. Cranking the cable on the winch.

Q. Was there only one man? Was there only Vatuone or more than one cranking the crank?

A. Mr. Dwyer was standing on the end of the crank helping Mr. Vatuone.

Q. Who was on the outside and who was on the inside of that handle?

A. Mr. Vatuone was on the inside.

Q. And Dwyer on the outside?

(Testimony of John Harris.)

A. Yes, sir.

Q. When you saw him going through the air and land, how far was he from where he had been cranking the cable? A. Fifteen feet.

Q. When you say you heard the motor, did you actually hear the hum of the motor?

A. Well, I think I did, yes.

Q. Did you observe what was happening to the cable when the motor started?

A. It was whipping through the shivs.

Q. When you say it was whipping through the shivs, was it going rapidly or slowly?

A. Oh, it was going very rapidly.

Q. What happened to this big metal crank handle? A. It was twisted. [29]

Q. Was it thrown out of its position as indicated in the picture? A. Yes.

Q. Where did that land?

A. On the deck not far from Mr. Vatuone.

Q. When you say that was twisted, what—you say it was twisted out of its normal condition?

A. That is right.

Q. What is that handle made of? Metal?

A. Steel.

Q. Do you know how the motor stopped?

A. I have no idea how the motor stopped.

Q. How long after Vatuone landed on the deck was it before the motor stopped?

A. A few seconds.

Mr. Ryan: I see. That is all, your Honor.

(Testimony of John Harris.)

Mr. Collett: In the light of what you told me at recess there is no contention that Vatuone was seaman, I understand? You are not making any contentions that Vatuone was a seaman?

Mr. Ryan: He wasn't a member of the crew, if that is what you mean, of that vessel. He was an employee, as I have stated before, of the United States Government and went on board vessels, Government transports, and did repair work.

The Court: Well, whatever legal definition may be given to him, you are not foreclosing yourself from such argument? [30]

Mr. Ryan: No, absolutely not, your Honor, no.

Cross-Examination

By Mr. Collett:

Q. How long had you know Mr. Vatuone, Mr. Harris?

A. Oh, I have known him off and on for four or five years.

Q. And you worked together at Fort Mason?

A. On a few jobs, yes, sir.

Q. What was his classification on the 15th of June? A. He said he was a rigger helper.

Q. A rigger helper? Did he have any other classification prior to that time?

A. He did, yes. He was a rigger prior to that.

Q. When?

A. Well, that was before he was laid off. They had a lay-off at Fort Mason, laid off a couple of hundred men and then we hired some of the fellows.

(Testimony of John Harris.)

and the only way they could come back there again was to come there as helpers.

Q. Do you know when he was laid off?

A. I am not sure of that, sir.

Q. Or how long he was laid off?

A. No, I am not sure of that.

Q. Do you know in what capacity he came back to work? A. He came back as a helper.

Q. What kind of helper?

A. Rigger helper. [31]

Q. Are you sure of that?

A. So far as I know, sir, yes, sir.

Q. You had your back turned to Vatuone, whatever he was doing? A. Not quite my back.

Q. Prior to the accident?

A. I had my side turned.

Q. Were you looking at Vatuone at the time?

A. I seen him go on the crank, yes.

Q. Well, you saw him go on the crank?

A. I saw him approach the crank and go to work on the crank, then I turned my head the other direction.

Q. How long was it from the last time you saw him until you heard the whir, as you stated?

A. Oh, maybe a minute or so.

Mr. Collett: No further questions.

Mr. Ryan: That is all, Mr. Harris.

The Court: The witness is excused. Thank you.

(The witness excused.)

HOWARD PATRICK DWYER

called as a witness on behalf of the Plaintiff being first duly sworn testified as follows:

The Clerk: Will you state your full name to the Court, please?

A. Howard Patrick Dwyer. [32]

Direct Examination

By Mr. Ryan:

Q. Mr. Dwyer, by whom are you employed?

A. Marine Repair Shops here at Fort Mason.

Q. In what capacity are you employed?

A. Rigger.

Q. Were you cranking this handle we were talking about with Mr. Vatuone at the time this accident happened? A. Yes, I was.

Q. Please tell his Honor how it happened.

A. Well, we come on the ship the day before and we took the wire all off the drums and we stretched it out so we can get the wire free from the shivs, and was going to take and take the wire in front of us to get the shivs free. We got the wire out and removed the shivs and we started to crank on there, the only way to do that, because the boat is cradled up against its nest and it was impossible any other way. So we had to crank. We kept cranking the crank, got so much and rest in between time. One of the other riggers, he started cranking, and it is pretty tough so we told him to take a break and two of us kept on going. We relieved each other quite a few times, you know.

(Testimony of Howard Patrick Dwyer.)

during the morning there for about, oh, pretty close to an hour, I guess, and we had pretty close to one-third of it on the drum, and then this other rigger went over and started cranking a little bit and it was getting a little harder, so Paul said to me, "Let's get her done," so I said, "O.K." Then him inside and I was outside, we cranked there for awhile, and all of a sudden [33] it just, the handle started going and it threw me a little bit to the side and kind of mussed me up a little bit, and then when I got my breath I see Paul laying on the deck and I see everybody coming around screaming around there.

Q. When you say the handle started turning, do you mean it started turning without the effort of you and Vatuone pushing it?

A. That is right.

Q. Did you hear a hum of the motor when it started to turn?

A. Well, I never heard nothing because it merely glanced me, threw me to the side.

Q. Did it throw you off your feet?

A. Yes, it did.

Q. Did you land on the deck? A. Yes.

Q. When you were on the deck did you notice what was happening to the cables that were on the deck?

A. No, I didn't notice anything for, oh, a few seconds, and then Paul was laying down on the deck then, see, and then I got my bearings. I went to get some help quick to get Paul fixed up.

(Testimony of Howard Patrick Dwyer.)

Q. Did you observe one way or the other what was happening to the cables?

A. No, I didn't notice.

Q. Do you know how long that motor was on or how it was [34] stopped?

A. No, I don't know how it was on and how it was stopped.

Q. You centered your attention on Vatuone, then? A. That is right.

Q. Let me ask you this: Had you and Vatuone performed this particular work on many times in the past?

A. Well, we have worked together quite a bit, yes.

Q. Doing this same kind of work?

A. That is right.

Q. Normally if this operation had been performed according to usual custom, do you usually put the cable back of the drum part way by hand?

A. Yes, to get it seated, and that is the way you usually start off, they seat your wire in there, like on the drum there are, on the winch, like little sections.

Q. You mean little grooves?

A. Little grooves where the wire lies and keeps hanging, and gets so many of them seated then we usually take and throw the wire over the side, and that way we can haul it up with the winch after we get the juice on.

Q. After you get one-third of it up by hand——

(Testimony of Howard Patrick Dwyer.)

A. We ask for power so we can get the rest of it on.

Q. In all the time you have worked there, have any of you men ever turned the power on yourselves.

Mr. Collett: I object to that as calling for a conclusion [35] of the witness.

The Court: Sustained.

Mr. Ryan: In the past, you were talking about the normal operation, you get one-third of the cable wound by hand and then you have the power applied. Has it been the custom or practice for the electrician to do that?

Mr. Collett: I object, if the Court please, to the custom and practice.

Mr. Ryan: All right.

Q. Did you know that the power was suddenly going to come on the motor?

A. Well, the power, so far as I knew, was dead.

Q. So it was unexpected when this thing happened.

A. That is right.

Mr. Ryan: That is all.

A. Because there was a life boat drill going on in progress there, and that is the first time I ever worked around a life boat drill going on.

The Court: Where was the life boat drill?

Mr. Ryan: I think this is the way to answer that question:

Q. All life boats with the exception of this one were being part of the life boat drill, weren't they?

A. That is right.

(Testimony of Howard Patrick Dwyer.)

Q. In other words, all other lifeboats—— [36]

Mr. Collett: Are you testifying now, or is the witness?

The Court: That is all right. It is explanatory. Was the synchronization on the winch interdependent on the lifeboat drill?

Mr. Ryan: I am going to have a man testify about that. We also have the deposition of the electrician who was on the job at the time it happened.

The Court: All right.

Mr. Collett: No questions.

Mr. Ryan: That is all.

The Court: You are excused.

(Witness excused.)

Mr. Ryan: Your Honor, in sequence—I am not going to read it, but we filed the deposition of Edward S. Bielski which was taken May 19, 1950, and he was the other of the riggers that was on this said job, which at this time I offer you in evidence, and we can read pertinent parts hereafter.

The Court: You can read it hereafter or it may be considered read.

(Deposition was marked Libellant's Exhibit 4 in Evidence.)

LIBELLANT'S EXHIBIT No. 4

In the Southern Division of the United States
District Court for the Northern District of
California

RINA MARIA VATUONE, as Administratrix of
the Estate of PAUL D. VATUONE, Deceased,
Libellant,

vs.

UNITED STATES OF AMERICA,
Respondent.

DEPOSITION OF EDWARD S. BIELSKI

Friday, May 19, 1950

Be It Remembered: That on Friday, May 19, 1950, commencing at the hour of 4:30 o'clock p.m. thereof, pursuant to oral stipulation between the proctors for the respective parties, at the offices of Messrs. Ryan and Ryan, in the Phelan Building, 760 Market Street, in the City and County of San Francisco, State of California, personally appeared before me, Anna T. Carroll, a notary public in and for the City and County of San Francisco, State of California, authorized to administer oaths, etc.,

EDWARD S. BIELSKI

witness called on behalf of the libellant in the above-entitled action.

Messrs. Ryan & Ryan, represented by Thomas C. Ryan Esq., appeared as proctors for libellant in the above-entitled action.

Mr. Frank J. Hennessey, U. S. Attorney, repre-

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

sented by Charles E. Collett, Esq., Assistant U. S. Attorney, appeared as proctors for the respondent.

And the said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of the above-named witness may be taken on behalf of the libellant at the offices of Messrs. Ryan & Ryan, in the Phelan Building, 760 Market Street, in the City and County of San Francisco, State of California, on Friday, May 19, 1950, before Anna T. Carroll, a notary public in and for the City and County of San Francisco, State of California, and in stenotypy by Eldon N. Rich, a competent official reporter, and a disinterested person.

It is further stipulated and agreed by and between the proctors for the respective parties that the deposition, when transcribed into longhand typewriting, may be read in evidence by either party on trial of said cause; that all objections as to the notice of time and place of taking the same are waived; that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition; that all objections as to materiality, relevancy and competency of the testimony are reserved to all parties for the time of trial.

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

It is further stipulated and agreed by and between the proctors for the respective parties that the reading over of the testimony to or by the said witness and the signing thereof are hereby expressly waived.

It is further stipulated and agreed by and between the proctors for the respective parties that the notary public need not remain during the taking of the deposition.

EDWARD S. BIELSKI

a witness called in behalf of the libellant in the above-titled action, being duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. Ryan:

Q. What is your name, please?

A. Edward Bielski. Do you want the middle initial?

Q. Yes. A. S.

Q. And how do you spell Bielski?

A. B-i-e-l-s-k-i.

Q. Where do you live, Mr. Bielski?

A. 1475 Tenth Avenue, San Francisco.

Q. And by whom are you employed?

A. Military Sea Transport Service. It was the army, I was employed by the army before. Now we are transferred over, so how would you put that?

Q. Well, all right. You were formerly——

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

Mr. Collett: The Navy took over all the transports.

Q. (By Mr. Ryan): That was March 1st, 1950?

A. That's right.

Q. And before that you were with the Army Transport Service? A. That's right.

Q. Operating out of Fort Mason, San Francisco, California?

A. I think they had the supervisor of water division and marine repair, port of embarkation.

Q. I see. Now how long have you been working between the military transport service and the Army transport service?

A. From December of '45 to the present.

Q. I understand you were in the Navy, is that right? A. Correct.

Q. All right. Now were you present when this accident happened to Paul Vatuone? A. Yes.

Q. And what was your occupation with the service on that day? A. I was a rigger.

Q. Rigger, all right. And you worked out of where? A. Fort Mason, San Francisco.

Q. All right. Now on that day were you with—

A. Oakland Army Base and Fort Mason all belong to one, but we reported to Fort Mason for work and go wherever our ship was. It is not necessarily going to Oakland. We might go to Richmond or Alameda or some other place.

Q. On June 15, 1949, when this accident hap-

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

pened, were you on the Army transport General D. E. Altmann? A. Yes.

Q. And where was the General Aultmann at that time?

A. She was tied up at the Oakland Army Base, and I forget what pier now.

Mr. Collett: Pier 4.

The Witness: Pier 4.

Q. (By Mr. Ryan): All right. Now, who were the riggers who were working with yourself and Vautone when the accident happened?

A. Paul Vatuone—I always say Vatuone.

Q. All right?

A. And Howard Dwyer, and the other two men were working in different parts of the ship.

Q. All right. What work were you doing just before the accident happened?

A. We were reeving the boat falls back on the winch, on the boat davit winch, or however—

Q. That was the winch of No. 5 lifeboat, wasn't it? A. Well—

Mr. Collett: Ask him the question and let him testify.

Q. (By Mr. Ryan): Where were you working?

A. On boat No. 5, winding the boat falls back on to the drum.

Q. Now, how were you winding the boat falls back on the drum?

A. By hand, or manual power.

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

Q. And when you say "on the drum," you mean the drum of what winch? A. No. 5.

Q. All right. Do you remember what side of the ship that was on?

A. No. 5 was on the starboard side.

Q. And where was it with relation to being forward or aft or amidships?

A. Let's see. That would be amidships.

Q. I see. And on what deck was it?

A. On the boat deck.

Q. All right. Now where was No. 5 lifeboat when you were winding the falls back on the drum of the winch?

A. It was cradled in its davit.

Q. At that time, when you were doing this work, can you state whether or not there was a boat drill in progress?

A. Yes, there was a boat drill in progress.

Q. All right. Now so the Court will understand this——

Mr. Collett: I am going to object to the form of the question as to what the Court is going to understand or what it will not understand.

Mr. Ryan: What was the last question?

(Record read.)

Mr. Ryan: Oh.

Mr. Collett: There is no assumption as to what the Court is or is not going to understand.

Q. (By Mr. Ryan): How long, approximately,

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

were these falls that you were winding on the drum, Mr. Bielski? A. I don't recall.

Q. Who was winding in on first? Which one of the riggers?

Mr. Collett: Well, I object to that question as being ambiguous.

A. I couldn't recall who started first. I might have started first, maybe Dwyer or Paul did.

Q. All right. Now when you——

A. Because when you are working in a group, you don't pay any attention.

Mr. Collett: Well, if you understand what he means. I don't know exactly what he means by the first.

Q. (By Mr. Ryan): How long did this winding, how long had it been going on manually when this accident happened?

A. Oh, 45 minutes or an hour.

Q. And how much of the falls had already been wound around the drum when the accident happened? A. About one-third.

Q. Now by what means did you turn the drum on the winch? A. With a crank.

Q. And can you describe that crank to us?

A. Well, it was just like a regular car crank, only it is much bigger.

Q. Did that crank fit into the drum?

A. Yes, sir.

Q. And how far does the arm that protrudes out from the drum extend, approximately?

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

A. 10 or 12 inches.

Q. All right. Does that extend at right angles out from the drum? A. Yes.

Q. Then is there another arm of the crank that extends in a perpendicular direction from the end of the right angle one? A. Yes.

Q. And how high is the perpendicular part of the crank? A. About 10 or 12 inches.

Q. Then is there a third part that protrudes at a right angle out from the perpendicular part?

A. Yes.

Q. And how long is that second right angle crank?

Mr. Collett: You have got this all balled up. You have got it extended out perpendicular from the drum.

Mr. Ryan: It is like this (indicating).

Mr. Collett: I know how it is, but it doesn't extend out from the drum perpendicularly. There is a portion inside the drum, then it turns, then it drops down.

Mr. Ryan: Look, there is this right angle part, there is the perpendicular part, and there is the second part.

Q. Will you answer that? How far does it extend, the right angle part, out from the perpendicular part?

A. You mean the one going straight up and down?

Q. Yes, the one you can put your hands on.

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

Mr. Collett: You are not talking about the same thing. He says the one that goes straight up and down and you say the one you put your hands on. Now what are you talking about?

Q. (By Mr. Ryan): Now you put your hands on the part of the crank that is farthest removed from the drum, don't you? A. That's right.

Q. Now how long is that part, that arm that is farthest removed from the drum?

A. I would say between 20 and 28 inches.

Q. O.K. And do you turn that, do you move that with an up and down motion? A. Yes.

Q. All right. When you were cranking it, were you cranking it by yourself or did you have someone helping you?

A. I was cranking by myself.

Q. All right. How many times do you have to turn that crank handle before you will have the cable go around the drum once?

A. If I remember, it is seven or eight turns of the crank to make one full turn.

Q. All right. A. Around the drum.

Q. Now will you please tell us what happened at a period when you stopped cranking and someone else relieved you?

A. Well, I was cranking for about, oh—I don't recall how long. I wasn't looking at my watch. When Paul and Dwyer said, "We will take over now." So I stepped out and they took over.

Q. I see. And when they took over, which one

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

was on the inside nearest the drum and which one was on the outside at the end of the crank?

A. Mr. Vatuone was inside and Mr. Dwyer was outside.

Q. I see. Now, how quickly after they relieved you did the accident occur?

A. I had my back turned when the thing happened.

Q. Yes. How far had you moved away from the crank when the accident happened?

A. Oh, about 15 or 20 paces, feet—15 or 20.

Q. And did you walk away immediately after they relieved you at the crank handle?

A. I was walking away slowly.

Q. And tell us what you know about the accident, when it happened. What did you see happen, as far as Paul Vatuone is concerned?

Mr. Collett: Well, now, I object to the form of that question as being about five questions in one.

Q. (By Mr. Ryan): Tell us what happened. Go ahead. Tell us what happened after you left the crank handle.

A. Well, I walked about 15 or 20 feet aft when Paul landed a little bit behind me or at my feet.

Q. All right?

A. So I turned around and kneeled down alongside the man that was injured, to see how bad he was injured, and hollered for somebody to get a doctor or ambulance. And I stayed right there

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

looking at Mr. Vatuone, and I really didn't see what went on around, or what happened, or anything else. Then when the ambulance arrived, I helped carry him off the ship and went over to the port dispensary or hospital, whatever it is, on the army base there.

Q. All right. That is all right. Now let me ask you this: You said you had been working on board the Altmann about, oh, 45 minutes or an hour, I believe you said, when the accident happened; is that right? A. That's right.

Q. All right. Now, during that time, did anyone ask the ship's electrician to turn on the power so you could put the cable on the winch by electricity rather than doing it manually?

Mr. Collett: Well, I am going to object to that question on the ground that it is a—"anyone" is a very ambiguous statement. It could be anyone on the ship or in the state of California, maybe; I don't know.

Mr. Ryan: All right.

Q. You may answer that now, subject to his objection.

A. Well, after we had one-third of the wire wound back on the drum, Paul suggested that if we had power, we could wind that up with power.

Q. And by "Paul," do you mean Mr. Vatuone?

A. Mr. Vatuone. And so, I don't recall who located the ship's electrician, but Paul went up and came back with the ship's electrician.

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

Q. All right.

A. And asked him if we could have power. The electrician came up and said we could not have, the power was on but it wouldn't work because the boat was two-blocked against the limit switches, and he wouldn't give us any power, or he said something—I don't recall now. It is over a year ago. So he said we couldn't have any power to wind it, and if we did have power, it wouldn't work anyway. So we asked him if it was all right to go ahead and wind it up, and we said we could wind it by hand and so we commenced winding it by hand. So I started winding.

Q. Did he say it was all right?

A. He said it was all right.

Q. I see.

A. The way—when I first went to work at the army, Paul was my foreman and I always looked up to him. And after a while he was terminated, you know, or laid off, and he was brought back. But then I always did look up to Paul as a leader and foreman, because I worked in his gang there for quite a while.

Q. I see. Let me ask you this: You know, after the accident happened, did you ever see the motor turning on that No. 5 winch?

A. Well, I didn't see the motor running, but it started up again, because the wire moved on deck. I could see the wire moved where I was kneeling alongside Paul there.

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

Q. You mean, the wire moving with nobody cranking it? A. Nobody cranked it.

Mr. Ryan: I believe that's all.

Cross-Examination

By Mr. Collett:

Q. Who was the foreman on the 15th day of June, 1949?

A. Our regular foreman was Mr. Emil Hahnemann, but it happened that day, the gang went over without a foreman, see—stayed over on this side.

Q. Hahnemann wasn't there?

A. No, he stayed over at Ft. Mason.

Q. How many were you in the gang at Ft. Mason? A. About five.

Q. Five? What time did you leave Ft. Mason?

A. Oh, I don't remember if we left by bus that day. Let's see. Around between 8:15 and 8:30, I think. No, about 8:15 we left there—8:15, around that neighborhood.

Q. What time did you arrive over at the Altmann?

A. Well, we arrived a quarter to or nine o'clock, around nine o'clock.

Q. Nine o'clock. And at the time that you arrived, what did you do?

A. Well, we reported to boat No. 5 and began our work.

Q. Began your work?

A. See, because day before we had pulled all

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

that wire off that drum, so the machinist could get the shivs out and rebush them and rework them.

Q. I see. You had worked on the ship the day before?

A. I didn't work on it the day before. The day before I was on the General Walker working, and I got, I done the same work on the General Walker, and a fellow by the name of——

Q. What was the condition when you reported on board the Altmann at about nine o'clock, as observed by you, as to the work to be done?

A. Well, all the wire was off the drum and it was to be wound back on.

Q. To be wound back on? A. Yes.

Q. And that was to be the collective job of the five of you, was to wind that wire back on to that drum? A. That's correct.

Q. And you started to do that at nine o'clock, did you? A. Yes, sir.

Q. When did the boat drill start?

A. I think they hold their boat drills at ten.

Q. You don't recall?

A. No, I don't recall, but they have a regular time that they hold them.

Q. Yes. Well, do you recall, have you any recollection, as to the interval of time that had elapsed in the amount of work that was done before the boat drill was begun? A. No, I don't.

Q. You haven't?

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

A. Because I wasn't interested in no boat drill or anything about it.

Q. Yes. Now the five of you undertook to start rolling the wire back on to the drum?

A. Well, no, the three of us. It was five men reported there for work. You asked me how many men.

Q. Yes?

A. Yes. Two men went down to work in another part of the ship. They had a motor to move down in the laundry. That is where Mr. Jackson and Mr. Jordan was working. That was the other two men.

Q. I see. Then there was you and Vatuone and who else? A. And Dwyer.

Q. And Dwyer?

A. Jackson and Jordan made up the gang.

Q. I see. And they were off on another job?

A. Down below.

Q. And when you started to work, rolling the wire on to the drum, who started first?

A. That I don't recall. I could have started first or Paul or Dwyer. I don't remember that.

Q. Well, did you have——

A. Because I worked, in the time there before the accident, I was winding there together with Paul and then winding with Dwyer. You see, in about five or six minutes you get winded, and another fellow takes over.

Q. Is it stiff winding?

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

A. Yes, it is very stiff winding. It takes all the beef you have to turn that thing.

Q. Did you work it by team, two men each time, and two on, one off?

A. We worked two together and then one off, and then just before the accident I was winding myself.

Q. You were winding by yourself. How long had you been winding by yourself?

A. Oh, I don't recall—five or six minutes.

Q. Five or six minutes?

A. Maybe longer.

Q. How long is your recollection from nine o'clock that you reported on, to the time of that accident's occurrence? A. How do you mean?

Q. Well, what is your recollection of the time interval? How long had you been working rolling the wire on to the drum, the three of you, before the accident happened?

A. Well, I figured it was about 10:20 when the accident happened.

Q. Figured about 10:20. All right. And then the three of you had been consistently, steadily—

A. Working.

Q. Changing off shifts, working the crank, rolling that wire back on to the drum?

A. That's right. See, when the wire was all off, we had to start rigging it all, reeving it by hand through all the different falls, then bring it down to the drum, secure it, bolt it to the drum, to secure

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

it to the drum. We wasn't winding steadily from nine o'clock. The wire was all off the drum. So we had to run it through all the leads.

Q. Well, then, let's go back and see just what you did, then.

A. Then we had it brought to the drum, and then we laid it all out on deck to see that it wasn't crossed over or fouled up.

Q. Well, when you got there at nine o'clock, what is the first thing you did?

A. Started reeving our wire through the shivs, bringing it to the drum, laying it out, seeing that it ain't crossed up or anything.

Q. Now I wonder if you might give me an illustration as to just what you did there at the beginning, just where the wire was, if you can?

Mr. Ryan: Here is a pencil.

A. I would say this is the deck of the ship (drawing diagram), and that this was the wire was laid out, back and forth like that, see (indicating)?

Q. Where is the winch?

A. I will say, for instance, the winch is sitting right there (drawing).

Q. Where is the lifeboat?

A. Well, let's see. Yes, she's offside and down, and your boat is right in here. Two blocks in the davit, and then you have shivs up on the top where she comes over, like this (indicating). You have shivs there, a hook that holds the boat, you know. Then we had to run all this wire from the deck

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

up through the shivs, and there is another deck up above there, and run the wire down this way and then around these shivs, so as to lead down to this winch. You understand me? So your davits would be like this (indicating), and your winch was set up and your boats and two blocks here. This wire was laid all over deck. So we run it up. Let's see, it was two wires. You start up from the top with your boat hook, run it all through and bring it down through the shivs.

Q. Where were the switches located for it?

A. Well, you have a rail.

Q. For the control—let me finish the question.

For the control motor to the winch?

A. The only switch that is for that boat there is on the rail, as we call it.

Q. A rail switch?

A. And we call it a dead man switch.

Q. Dead man switch?

A. That is for raising the boat. You see, the boat goes down by gravity.

Q. Yes. What is the limit switch?

A. The limit switch is up on the davits, and when the boat hits the limit switch, it is supposed to cut off the power.

Q. Where is the limit switch with reference to these shivs, do you call them? A. Shivs.

Q. To the shivs?

A. And that is the wheels or pulleys that the wire goes through. This is the davit, for instance,

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

and there is a switch in a track-like. It rolls similar like a wheel with an iron, and there is a roller comes, this davit is like this (indicating) and then it sets in a track affair, like, you know. As she rolls up this track, she hits this wheel, she goes over this wheel and knocks it down, and that cuts off the juice, and when that is up against it we call it two-blocked.

Q. Yes. Now you are running the wire through the shivs, and that had nothing to do with the limit switch?

A. Oh, no, that had nothing to do with the work.

Q. I see. Then you arrive at nine o'clock, and you say your first work was to clear that wire and run it up through the shivs?

A. That's right, to see that it wasn't tangled, you know, and would go free.

Q. Yes. Now about what time, if you recall, did you begin to crank?

A. I would say around 9:45, maybe, or 9:50.

Q. About 9:45, 9:50, and your recollection is that the accident occurred at 10:20, is that right?

A. That's correct, yes.

Q. Do you recall who started to crank first?

A. No, I couldn't say. I might have started first, or two men starting together.

Q. When two men were on the crank, they faced each other? A. Or side by side.

Q. Side by side?

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

A. (Nodding in affirmative.)

Q. All right. And immediately preceding you, when you took over the crank, were Vatuone and Dwyer together on it?

A. That's right, they were in there together.

Q. And you relieved Dwyer and Vatuone?

A. That's right.

Q. And how long, do you recall, that you were cranking? A. Five or six minutes, I guess.

Q. Five or six minutes? A. Yes.

Q. Now, what is your recollection as to just what happened when you were relieved? Just try to put yourself back at the time and tell us just what your recollection is.

A. Well, Mr. Vatuone and Mr. Dwyer relieved me, I started to walk aft.

Q. You started walking aft?

A. M-hm (affirmative).

Q. Did you observe in what direction they had assumed with regard to the crank?

A. No, I didn't.

Q. You didn't? A. No.

Q. You just turned your back and started walking aft? A. (Nodding in affirmative.)

Q. **And what is your next recollection?**

A. Well, Mr. Vatuone landed at my feet there.

Q. Ahead of you or behind you, or did you hear the thud?

A. Well, let's see. Right alongside of me. I would say.

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

Q. So he had been projected in the air, or did he roll on the deck? A. I couldn't say.

Q. You couldn't say?

A. No, I didn't see it.

Q. You just became aware of the fact that he was behind you, or to the side of you, and that attracted your attention? A. Yes.

Q. Now, when you left the crank, you didn't go over to the rail or do anything with the rail switch?

A. No.

Q. The dead man switch. You didn't touch that, did you?

A. I would have to go past the two men.

Q. You would have to go past the two men? Your recollection is, you simply turned your back and turned away, going aft?

A. That's right.

Q. Now this conversation that you said you had with the electrician, when did that occur?

A. Well, that was after we had about one-third of the wire wound on, we went——

Q. Now you say when you had one-third of the wire done? A. Wound on.

Q. Now can we place that with reference to your relieving Vatuone and Dwyer? That is, prior to the time that they relieved you, how long was it immediately prior to that time, the time you took over the crank? Understand my question?

A. No, I don't.

Q. Well, you relieved, so you testified, Vatuone

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

and Dwyer, and then you were relieved by Dwyer and Vatuone? A. That's right.

Q. And you had walked away?

A. That's right.

Q. And Vatuone landed somewhat in the vicinity of your feet? A. (Nodding in affirmative.)

Q. Now, you stated that you were five or six minutes cranking by yourself, right?

A. That's right.

Q. And in your last hitch there. Now, how long was it, what was the interval of time between this so-called conversation with the electrician and your hitch on the crank?

A. Oh, I would say about ten minutes.

Q. About ten minutes?

A. M-hm (in affirmative).

Q. And what is your recollection with regard to who was present at that conversation?

A. Me, Mr. Vatuone and Mr. Dwyer and the electrician.

Q. Do you know who the electrician was?

A. I don't know his name. I am not good at remembering names.

Q. Looking aft from that particular lifeboat and that winch and drum, there is a control, there is a passageway that leads into a control room, isn't there? A. That's correct.

Q. It is about what distance?

A. Oh, I never knew where that control room was until that day of the accident.

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

Q. You didn't know where it was?

A. Let's see. I have heard them say 20 feet.

Q. 20 feet. Were you ever in that control room?

A. Never.

Q. I think you testified that Vatuone left the vicinity of the winch where you were working to find the electrician, is that right?

A. That's correct.

Q. And he came back with him?

A. Came back with him.

Q. In which direction did they come?

A. They came from back aft; evidently he must have met him right on the boat deck there.

Q. Do you recall how long he was gone?

A. Oh, he wasn't gone very long.

Q. I see. A. Only a few minutes.

Q. Did you have any conversation prior to the time of his leaving? A. Not that I recall.

Q. Then——

A. What do you mean, conversation?

Q. Well, conversation with Vatuone.

A. Well, about the work or——

Q. Well, Vatuone just picked up and walked off, was that it?

A. Oh, no, he said, "We'll get the ship's electrician and see if we can get power." See, you have to wind a certain amount of turns on the drum so she seats itself, and once the wire is seated in its grooves, you can wind it by power. That is the way we had been doing it.

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

Q. Oh, was that remark made at the beginning of it? A. No, it wasn't.

Q. Had you been cranking for some time when that remark was made, or that suggestion was made?

A. Yes, we were cranking for some time, and Mr. Vatuone says, "We will see if we can get some power and wind it by power."

Q. Then the electrician came back with Vatuone, and what was the conversation there?

A. Well, he told us that we couldn't have no power because the boat was two-blocked against the limit switches, and it wouldn't work. So we said we would wind it by hand, and he said it was all right to go ahead and wind it.

Q. How do you know he was the electrician?

A. He said he was.

Q. Did he have on any uniform? A. No.

Q. Any insignia?

A. Not that I recall of. He might have. I didn't look too closely.

Q. You don't know; did he say in your presence that he was the electrician?

A. Well, after I was in the captain's office, they brought the ship's electrician in, to give a statement. Same man.

Q. Now in this conversation, he stated that you couldn't turn on the power, or that he couldn't turn it on so that you could operate the winch?

A. That's right.

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

Q. And had you ever crank-wound the wire on any other ship?

A. Just got through on the General Walker before that.

Q. Winding by the crank?

A. Winding by the crank.

Q. Vatuone on that job?

A. No, he wasn't. He was on another. You see, Vatuone was working with Dwyer on the Altmann. I was working on the Walker, so when my job was done on the Walker, I was to go over there and help the boys out. The gang was split up. It so happened we had quite a few ships in.

Q. Prior to this other job that you mentioned, had you ever done any winding by hand crank?

A. Practically at that time—that was the way we were doing it, overhauling all the ships. Most of the transports, yes.

Q. And did you use the hand crank to wind the wire on to the spool or the winch—the drum, rather?

A. Yes, sir.

Q. In each instance?

A. Each instance we would wind out one-third and get power and wind the rest of it on.

Q. You would wind on one-third?

A. One-third, about that much.

Q. Why would you have to wind on a third?

A. On this drum it has grooves in it, and the wire has to seat itself into the grooves. Once it is seated, then she lines up, is lined up, you have to

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

line it up, and you wind so much by hand and then you can wind with power. The power will take over.

Q. And on the other jobs you had—the other ships—you had succeeded in using the power after you had wound the wire on the drum about one-third the length of the wire, is that right?

A. That's right.

Q. And you worked with Vatuone on any of those jobs? A. Yes.

Q. Which one?

A. I can't recall the ship. Let's see. I would have to know which ship it was before that.

Q. And was it the same kind of gear, the winch and the drum and the dead man switch and the limit switch, in regard to the davits?

A. Yes, same thing.

Q. And do you know how the power was turned on on the other ships?

A. By the ship's electrician. We would always ask him.

Q. You would ask him?

A. You see, we have no business turning on any power or touching any switches, whether you are a rigger, machinist, or who you are.

Q. Yes. You asked the electrician, and in the other instances the power was turned on?

A. That's right.

Q. Did you or the other men with you operate

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

any switch then to stop and turn on the power as you used it?

A. Usually the ship's electrician is there, and he handles that end of it.

Q. Well——

A. The ship's electrician is there, and he works the switch.

Q. Well, on the other ships with the power on, you just didn't keep continuously winding it; it was undoubtedly stopped to clear the wire and run it through the shivs?

A. Oh, yes. No, the wire is already run through the shivs, and the butt end is secured to the drum, and we watch that she is seating herself.

Q. And you have to stop it and start it?

A. And guide the wire as it goes on, that's right.

Q. And you would have to start it and stop it and start it?

A. Yes.

Q. Now, how did you do that?

A. Ship's electrician would be on the switch.

Q. On which switch?

A. Dead man's switch.

Q. On the dead man's switch?

A. Or one of the workers. See, I can go on to that ship Monday morning and say, they'll say, pick up a load for me. I will go try the gear, and if it is o.k., I will find the mate or the ship's electrician and ask him if he would have the power on on No. 1, No. 2 gear, or whatever. He would say o.k. and

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

he puts the power on. If there is anything wrong, he says, "That gear is out." He knows about it.

Q. Do you know what Vatuone's classified position was at the time, on the 15th of June?

A. No, I don't. You see, we go by grades and steps, and I don't know. He was first class, I know.

Q. You are doing work that might be called a rigger, but you don't know whether that was actually his classification?

A. That's right. See, Paul was terminated a couple of times. By that, I mean laid off and called back. You could get it from personnel files.

Q. Well, if you don't know, just say you don't know. You don't know of your own knowledge, is that it?

A. No, I would have to guess. It would be guessing.

Q. Did you work steadily during the same period of, say, the year prior to June 15, 1949, at Ft. Mason? A. Yes.

Q. You worked steadily?

A. I worked steadily.

Q. And——

A. From December, '45, to the present.

Q. I see. How long, do you recall, had Vatuone been working immediately prior to the accident, if you know? A. I don't know.

Mr. Ryan: Was he there before you?

A. Oh, Paul was there in '45 when I came. He was my foreman.

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

Mr. Ryan: I see.

The Witness: But then he was laid off and he was called back. Then I am pretty sure he was laid off twice.

Q. (By Mr. Collett): Now, after the conversation which you told us about with the electrician, where did he go, did you notice?

A. I guess he went about his business.

Q. You don't know which direction he went when he left?

A. Really, I didn't look to see.

Q. You didn't look to see? You have no recollection? A. No.

Q. All right. Were there any other men around the area in which you were working?

A. Well, there were machinists. They were up on top of the davits.

Q. How many machinists were up there?

A. Well, there was St. Clair was one. Let's see. There was five of them.

Q. Were they from Ft. Mason?

A. Ft. Mason machinists.

Q. Did they have any interest in using power on the winch? A. None.

Q. How long would you say was the interval of time after the electrician left that you were relieved of your shift on the crank?

A. 15 or 20 minutes.

Q. 15 or 20?

A. I have no recollection of time at all.

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

Q. Might just as well have been 5 minutes or 15 minutes, is that it? A. That is it.

Q. Well, maybe you could figure it by some other process. When the electrician came up, who was on the hand crank? A. No one.

Q. What? A. No one.

Q. No one?

A. The crank was taken out, laying on the deck. We never leave the crank in when we walk away from it.

Q. You don't leave the crank in?

A. No, sir.

Q. You don't?

A. The crank was taken out and laid on deck.

Q. Well, you hadn't started to use it then, at that particular point, had you?

A. No, we was waiting to see if we could get power.

Q. You had already accomplished winding up one-third? A. Correct.

Q. And the electrician came up, and then who put the crank back into the drum, would it be?

A. That's correct. I don't recall; I don't remember if I was first to start it or Dwyer or Vatuone. All I recall is, I was relieved by the two men when the accident happened.

Q. You don't recall how many shifts you might have participated in from the time that the crank was put back into its position, cranking position.

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

until you were relieved and were walking away when the accident occurred?

A. I do not recall, no, sir.

Q. Your best recollection of that is about 15 minutes?

A. I would say about 15 minutes, yes.

Q. Now, you say you noticed a wire move after the accident, as though the motor had started again?

A. Yes.

Q. Do you know whether or not the motor started again?

A. I saw the wire move, but I don't recall the motor starting or turning, because I was kneeling alongside the man.

Q. Well, in other words——

A. But the wire moved.

Q. Well, whatever the action had been, the turn of the crank would have spun that way on the drum, too, wouldn't it; at the time that Vatuone was thrown, the wire was still connected to the drum, and then would have been wound at the same time, or unwound? A. That's right.

Q. Was it unwound or wound?

A. It was winding.

Q. It was winding and the action of the motor coming on and turning it, did it wind it or unwind it? A. Wound it.

Q. It wound? A. Wound it.

Q. Well, then, that was rather a forceful movement, wasn't it, so that—is that right?

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

A. That's right.

Q. So that your observation of the wire moving might have been the reaction of the wire to the movement that had already occurred? Do I make myself clear? A. Yes.

Q. You didn't actually hear the motor start?

A. No, I couldn't recall hearing the motor start.

Q. All right. Did the ship's electrician come back to the area of the No. 5 lifeboat after the accident?

A. I was so interested at—well, wait a moment. I don't recall seeing anyone, because I was kneeling alongside Paul there and waiting for help to come. Next time I saw the man was in the captain's cabin. That was a good deal, quite a long time later.

Mr. Collett: That is all.

Redirect Examination

By Mr. Ryan:

Q. Are you going to be away from San Francisco in the next couple of weeks?

A. I will be back on the 4th of June. Why?

Q. Well, we have got to get this into the record. Are you on your vacation now? A. Yes.

Mr. Collett: On leave, is the proper term.

The Witness: Annual leave.

Q. (By Mr. Ryan): Annual leave. And are you going to be away from San Francisco during that annual leave? A. Yes.

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

Q. And as you mentioned, you will be away until June 4, is that correct? A. June 4.

Mr. Ryan: I have just one other question in regard to the accident.

Q. After the accident had happened, did you observe the condition of the crank?

A. Laying on deck.

Q. Yes, and what was its condition? Was it any different than it was before?

Mr. Collett: Well, by "condition," what do you mean?

Mr. Ryan: I don't want to lead him——

Q. But you mentioned to me that the crank was twisted out of shape. Is that true?

A. That's correct.

Mr. Ryan: That is all I wanted to get. Thank you.

Recross-Examination

By Mr. Collett:

Q. Well, twisted out of shape in what respect?

A. Well, out of its original shape. It was bent.

Q. It was bent—which portion of it was bent?

A. I couldn't say, but I know it was bent.

Q. Well, where was it when you next saw it after you left and walked away?

A. Lying on deck alongside the winch.

Q. That is, after you had walked, turned your back, Vatuone arrived in the area of your feet, the next you saw the winch was——

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

A. I didn't see that crank until I come back to the ship. I left the ship with Mr. Vatuone to go to the dispensary.

Q. Oh, you didn't?

A. When I come back, then I saw the crank laying there. I didn't observe where the crank was or what happened. There was a man injured on deck.

Q. Yes, I understand.

A. I was still with the man. I didn't look for the fault of the machine or anything else, where it was.

Q. Yes, I see. I was pretty sure that was what happened. When did you come back to the ship?

A. Well, I was gone a good hour.

Q. You were gone a good hour?

A. Maybe longer. We went over to the dispensary, then we stayed around until they put him in the ambulance and drove him to the hospital.

Mr. Collett: That is all.

Further Redirect Examination

By Mr. Ryan:

Q. Did that crank handle—was that a metal handle or a wooden handle?

A. It is made of steel, I guess.

Mr. Ryan: That is all.

Mr. Collett: That is it.

Libellant's Exhibit No. 4—(Continued)

State of California,

City and County of San Francisco—ss.

I certify that, in pursuance of stipulation of counsel, on Friday, May 19, 1950, before me, Anna T. Carroll, Notary Public in and for the City and County of San Francisco, State of California, personally appeared Edward S. Bielski, witness called on behalf of libellant in the above-entitled cause; and Messrs. Ryan and Ryan, represented by Thomas C. Ryan, Esq., appeared as proctors for libellant in the above-entitled action, and Mr. Frank J. Hennessy, Esq., United States Attorney, represented by Charles E. Collett, Esq., Assistant United States Attorney, appeared as proctors for respondent in the above-entitled action; and said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid, did thereupon depose and say as appears by his deposition hereto annexed.

I do further certify that the deposition was then and there taken down in stenotype notes by Eldon N. Rich, a competent official stenotype reporter and a disinterested person, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors for the respective parties, the reading over of the deposition to the witness and the signing thereof was expressly waived.

And I do further certify that I have retained the said deposition in my possession for the purpose of

Libellant's Exhibit No. 4—(Continued)

delivering the same with my own hands to the Clerk of the United States District Court for the Southern Division of the United States District Court for the Northern District of California, the court for which the same was taken.

And I do further certify that I am not of counsel, nor attorney nor proctor for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in said caption.

In Witness Whereof, I have hereunto set my hand in my office aforesaid this day of, 1950.

.....,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed May 25, 1950.

Mr. Ryan: Mr. Bush, please.

ANTHONY BUSH

called as a witness on behalf of the Libellant, being first duly sworn, testified as follows:

The Clerk: Will you state your full name to the Court, [37*] please?

A. Anthony Bush.

Direct Examination

By Mr. Ryan:

Q. Where do you live, Mr. Bush?

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Anthony Bush.)

A. Westinghouse Electric Corporation.

Q. I mean, is your residence in San Francisco?

A. San Francisco, oh, yes, sir. 68 Walter Street.

Q. You are employed by the Westinghouse Electric Company? A. Yes.

Q. And in what capacity are you employed by that Company? A. Field Supervisor.

Q. Generally speaking what are your duties as a Field Supervisor for Westinghouse?

A. Well, I dispatch the men to various jobs and take care of the paper work for that particular job.

Q. What is your profession?

A. Well, I have got a professional license.

Mr. Collett: Will you speak up a little bit, please?

A. I have a state of California professional license of Electrical Engineer.

Q. (By Mr. Ryan): You are an electrical engineer, licensed as such by the State of California, are you? A. Yes.

Q. How long have you been an electrical engineer?

A. Well, I have been working in that profession since 1937. [38]

Q. Since 1937 to date have you been working continuously in your profession of electrical engineer? A. Yes, sir.

Mr. Collett: I will stipulate that he is with Westinghouse, qualified for whatever he is going to testify, to save time. I don't know whether he is.

The Court: It isn't too extended, is it?

(Testimony of Anthony Bush.)

Mr. Ryan: No, it isn't.

Q. (By Mr. Ryan): Did you attend any colleges, Mr. Bush?

A. Rensselaer Polytechnic Institute, New York.

Q. Rensselaer Polytechnic Institute, Troy, New York?

A. Yes, sir. It is an engineering school.

Q. That is exclusively an engineering school?

A. Yes, sir.

Q. How long did you attend Rensselaer Polytechnic Institute?

A. Three and one-half years total.

Q. How long have you been employed by Westinghouse? A. Since 1944.

Q. And have you been employed continuously by them since 1944? A. Yes, sir.

Q. In all that time as an electrical engineer?

A. Yes, sir.

Q. Who are you familiar with and have you had experience with electric currents and electric switches?

A. That is kind of a broad question. Yes, I have done a lot [39] testing on various of our electrical apparatuses.

Q. Have you had experience in testing Marine electrical apparatuses on board ships and have you got Westinghouse Electrical equipment on board Government transports?

A. Yes, some of them have quite a bit of Westinghouse equipment.

(Testimony of Anthony Bush.)

Q. Have you had experience in installing and repairing that equipment? A. Yes, sir.

Q. Have you had experience in testing that equipment for defects of any kind?

A. Yes, sir.

Q. All right. Now, following this accident did you make an investigation to determine if there was any defect in the electrical equipment on board the General Altman?

A. The following day, yes, sir.

Q. The following day? You went on board the ship, did you? A. Yes, sir.

Q. Did you expressly test the electrical equipment that would operate the motor of the number 5 winch or number 5 lifeboat? A. Yes, sir.

Q. Will you please tell the Court whether or not you found any defects in that equipment?

A. No, sir. [40]

Q. Now, so we will understand this matter, could you please tell us where the electricity originates and where it goes in order to start the motor of the number 5 winch?

A. Well, to start off with, the current is fed through a knife switch.

Q. Pardon me?

A. The current is fed through a knife switch, from the generator through the knife switch. There is a control handle there and from the control panel there is a circuit goes to the dead man switch and also to two limit switches, then from there this circuit feeds a contactor which is in the control box.

(Testimony of Anthony Bush.)

Q. Well, so we will understand that I might interpolate a little more clearly, you say the current is fed from the panel? A. That is right.

Q. Where is the panel located?

A. That is about three decks below.

Q. Down in the engine room?

A. Down in the engine room, yes, sir.

Q. Then you say, if I understand your testimony correctly, that the current would go from the generator up to the control panel on deck?

A. That is right.

Q. When you say the control panel on deck, where is that control panel situated in relation to the winch of the number 5 lifeboat? [41]

A. It is in a housing about 30 or 40 feet away from this particular boat davit.

The Court: You are referring to Libellant's Exhibit 3, Mr. Ryan?

Mr. Ryan: Yes, thank you.

Mr. Collett: Well, if the Court please, not having to go around a lot of words here and generalize, I have no doubt Bush is familiar with it, and it takes a whole hour's time here and perhaps if he would take a look at this we could save considerable more hours.

Mr. Ryan: I may avail myself of that, but I want to straighten myself out on those matters so that I may understand it, and your Honor also.

Q. (By Mr. Ryan): In regard to this control panel, you say that is on the same deck as this motor and 30 or 40 feet away, is that correct?

(Testimony of Anthony Bush.)

A. Approximately, yes.

Q. Is there any fixed object in the way of it that would prevent a man standing at the control panel from seeing men operating the winch by hand?

A. From the control panel, you mean?

Q. Yes.

A. It is impossible to see anyone at the winch from the control panel for it is in a housing behind a closed door and you would have to open the door and go back into a corner, and [42] it is impossible to see for it is in the opposite direction from where you could look out through that door.

Mr. Collett: If the Court please, again in Exhibit 2, is a picture of the Aultman, and I am personally standing in front of the entrance of that control board here, for counsel's information, so we can save some time for the Court. It seems to me there are matters here we can dispose of very readily.

Mr. Ryan: I won't be long. I would like to do it my own way. Maybe counsel can cross-examine on that if he wishes.

Q. (By Mr. Ryan): From the control panel you say the current would go into a dead man switch, is that it?

A. Well, that is the controlled circuit. The controlled circuit goes to the dead man switch.

Q. Where is the dead man switch located?

A. Well, it is right along side of the motor so that you could at the same time go down below to

(Testimony of Anthony Bush.)

see when the boat is ready. The man has control of the lifeboat from the dead man switch.

Q. When you say "dead man switch," do you mean a switch where you have to keep your hand on the switch in order to keep it operating?

A. That is right.

Q. If you don't keep your hand on the switch will the switch operate?

A. That automatically breaks the current. [43]

Q. Then you mentioned—so your Honor will understand—two limit switches. Please tell us where they are located.

A. These limit switches are located between the runways of the lifeboats, one on either side.

Q. How high above deck are they?

A. About ten feet above deck. Eight or ten feet.

Q. What is the function of these limit switches?

A. These limit switches, as the boat gets up to its position at its nest they automatically cut the current on the motor and stop the motor.

Q. That is to prevent the boat going too high and busting everything up above overhead.

A. That is right, sir.

Q. When the boat goes there and reaches its cradle the limit switches automatically shut off?

A. It is just before it gets to the nesting point when it shuts off. It is adjusted so that it shuts off about, oh, I would say eight or ten inches before it reaches its nest.

Q. Now, let me ask you this: Assuming number

(Testimony of Anthony Bush.)

5 lifeboat, let us say, on the day of the accident was in its nest. Let's assume further that no one was manually holding his hand on the dead man control switch on the rail, or wherever it was. Now, what is the only method of starting the motor on the number 5 winch under those circumstances?

Mr. Collett: Well, if the Court please, I am going to [44] object to that, what was the only method. There is nothing to indicate whether there is an only method, and to assume whether or not there is any method or methods, but the question includes "the only method."

Mr. Ryan: I will take that amendment.

Q. (By Mr. Ryan): Tell us, what is the method of starting the motor on the number 5 winch?

A. Well, this dead man switch operates a solenoid on the contact board. In other words, it energizes this solenoid when the contactor is pulled, makes contact, and that feeds power to the motor.

Q. Well, if the motor is—assuming that the motor is not operating. Assume further that two men have a crank at the winch and are winding the cable around the drum of the winch, turning that drum manually by hand. If that is so, what would a person have to do to start the motor on that winch?

A. Well, the first thing, the knife switch would have to be closed and the conductor would have to be energized.

Q. The knife switch would have to be closed and what else?

(Testimony of Anthony Bush.)

A. And the solenoid on this container would have to be energized.

Q. What is that word? A. Solenoid.

Q. Would have to be energized? Now, where is this knife switch you are talking about [45] located?

A. That is on the panel, at the control panel.

Q. That is the panel you have told us about which is 30 or 40 feet away from this winch and on the same deck? A. Yes.

Q. You say the knife switch would have to be pulled? What would a person have to do to pull the knife switch?

A. Well, he would have to, first of all, get into the compartment and open the panel. The panel is an enclosed panel. He would have to open that and manually close the knife switch.

Q. And that switch is merely like any other electric switch, just move it? A. That is right.

Q. Then you say if you did that the solenoid would be energized? A. No, sir.

Q. What? A. No, sir.

Q. How do you energize the solenoid in that panel?

A. You would have to, first of all, before you could do that, you would have to bypass the limit switches and the press the dead man switch.

Q. Supposing the lifeboat is in the nest, that would eliminate the limit switch?

A. That is right.

(Testimony of Anthony Bush.)

Q. If no one is holding down the dead man switch, that would [46] eliminate that switch?

A. That is right.

Q. Therefore, is it true a man at the panel could turn on the electricity for that motor by shoving in the panel?

A. Manually closing the contactor, yes, sir.

Q. Did you ascertain in your investigation that it was the duty of the ship's electrician to stay right by that panel during an entire lifeboat drill?

A. No, I did not.

Mr. Collett: I object to that, what would have been the duties of the electrician, so far as this witness is concerned.

Mr. Ryan: Well, we will have the electrician's deposition for that.

The Court: All right.

Q. (By Mr. Ryan): I don't know if I understand that. Is that a hard thing to do? If a man is standing by the panel, is it hard to start that motor? Does he merely have to press the switch?

A. It isn't a switch, sir. The contactor is not a switch that does—it isn't made for pressing manually at all.

Q. By that I mean is it much of an operation to turn on the electric current?

A. Well, you would have—this particular contactor is a magnetic contactor and just a plate whereby as soon as a solenoid is energized you would poke this plate in, so by [47] pushing the

(Testimony of Anthony Bush.)

plate in you automatically make contact at the main motor.

Q. By pushing the plate, is it something that could be done just like pushing one of these buttons over here in the Courtroom?

A. It isn't as simple as that, no.

Q. How do you push this plate to start the electricity? Do you do it with a tool or by hand or what?

A. You could push it in with your finger or a pencil or——

Q. Let me ask you this question, which I think is very important, your Honor, in this case: You as an electrician, do you know if there is any other way of starting the motor at that number 5 winch other than you have indicated?

A. I don't know of any other way, sir.

Mr. Ryan: No other way. That is all, your Honor.

Cross-Examination

By Mr. Collett:

Q. Well, somebody using the dead man switch, with the knife switch in place it would start the motor, wouldn't it?

A. Not if the limit switches were not by-passed. If the boat was in the nest and the limit switches were operating—they were in proper adjustment when I examined them. The dead man switch could not operate the motor with the boat nested.

Q. Under what circumstances can you operate the motor with the boat nested? [48]

(Testimony of Anthony Bush.)

A. By throwing in the knife switch and closing this contactor manually.

Q. In other words, in any situation in which the lifeboats have been nested and this wire is being strung and these men utilized power to wind up the wire onto the drum, what has been the process by which they could utilize the power?

Mr. Ryan: Just a moment, your Honor. If I understand that question correctly he is asking this witness to assume the men had used power to wind the cable on the drum, and I think the testimony is to the contrary, that they did it by hand.

Mr. Collett: I said assuming that the wire had been run and the men were winding that wire back on the spool, the lifeboats nested, what would be the process whereby they would utilize the power.

Mr. Ryan: Just a moment. I object to that on the ground that it, number one, assumes something not in evidence, and, number 2, he is asking the witness for a question as to what might have happened which didn't occur at the time of the accident. It injects a false element in the case.

The Court: Well, he may answer.

Mr. Ryan: All right.

A. The solenoid cannot be operated with the boat nested. And the limit switches in position, which would automatically cut the current to the solenoid. They would have to be [49] eliminated first.

Q. (By Mr. Collett): The limit switches would have to be animated first, you say?

(Testimony of Anthony Bush.)

A. Eliminated.

Q. What method is used to eliminate the limit switches?

A. Well, the only method I know of now, is just put the bumpers across the limit switches; in other words, by-pass the limit switches.

Q. Then when the lifeboats are nested if they put bumpers up there you can by-pass that and operate it from the dead man switch?

A. Yes, if the knife switch is in.

Mr. Ryan: If what?

A. If the knife switch is in.

Q. (By Mr. Collett): By your examination on the day after this accident you found all gear in perfect working condition, is that right?

A. That is right.

Q. No defect of any kind? A. No, sir.

Mr. Collett: That is all.

Redirect Examination

By Mr. Ryan:

Q. Here is something I want to find out. If I understand your testimony correctly, did you or did you not state this, that with the lifeboat—when the lifeboat is [50] nested you cannot start the motor by the dead man control, is that correct?

A. That is right.

Q. So, so far as this accident is concerned, we can eliminate the dead man control as a factor, can't we? A. Yes.

(Testimony of Anthony Bush.)

Q. Because even if the man did by his hand operate the dead man control, with the lifeboat nested that couldn't start the motor?

A. That is right.

Q. So we can skip that. I believe in your last answer that you gave Mr. Collett you stated that even if somebody put bumpers, which we have no evidence of, under the limit switches still the motor couldn't start unless somebody operated the knife switch?

A. The knife switch would have to be in, yes.

Q. When you say the knife switch would have to be in, does that mean the switch is in operation?

A. That is right.

Q. Does all this come back to the question that the only way you could start that motor is by operating the knife switch at the control panel?

A. Well, the knife switch is a stationary switch, which you know, you put it in and it stays in position. In other words it doesn't drop out when you shut off the current. When the [51] contactor power is off it automatically cuts out.

Q. To reiterate just once: I asked you before, there is no other way to start this particular motor of the number 5 winch except operation on the control panel on deck 30 feet away from the winch?

A. That is right. I would like——

Mr. Ryan: That is all.

A. ——to state one thing. When you asked the question before if I found any defects, there was one little screw that was loose in that limit switch,

(Testimony of Anthony Bush.)

but it had nothing—it was just simply loose, about a quarter of a turn loose.

Recross-Examination

By Mr. Collett:

Q. Is that the control panel?

A. Looks similar to it.

Q. That is the control panel, isn't it?

A. It is a similar control, yes, sir.

Q. Could you identify that photograph?

A. Yes, sir, that is the control panel.

The Clerk: Are you offering this, Mr. Collett?

Mr. Collett: Yes.

Q. (By Mr. Collett): There isn't any way you could identify that? A. No, sir.

Mr. Collett: Do you want to stipulate that was taken on the 15th of September on the [52] Aultman?

Mr. Ryan: Did he identify that?

Mr. Collett: Yes.

Mr. Ryan: Then I will stipulate.

(Exhibit was marked Respondent's Exhibit A, in evidence.)

Mr. Collett: The same for this?

Mr. Ryan: Yes.

(An Exhibit was marked respondent's Exhibit B, in evidence.)

Q. (By Mr. Collett): Would you please indicate on Respondent's Exhibit B the knife switch?

(Testimony of Anthony Bush.)

A. This is the knife switch (indicating).

Mr. Ryan: Pardon me, could I see where he pointed?

Mr. Collett: Yes. He pointed to the top of the photograph. It has written on it, looks like——

Mr. Ryan: "Discontinuing switch."

A. Disconnecting switch, probably.

Mr. Collett: Disconnecting switch. That is written on there.

Mr. Ryan: Could he mark it with an S, if I might suggest, to the knife switch, because we refer to it so much.

Mr. Collett: All right, mark them where you want. There are two knife switches.

A. No, one.

Mr. Ryan: Put it on the one knife switch.

A. This is——

Q. (By Mr. Collett): Well, the knife switch doesn't identify [53] anything except a certain type of switch, doesn't it?

A. That is right. Disconnecting switch.

Q. Actually a designation of that particular switch that's all.

A. A disconnecting switch.

Q. A disconnecting switch, physically a knife switch, is that right? A. That is right.

Q. And the switch you have indicated with a mark "X," and which has writing on the side, "Disconnecting switch" at the top of the photograph, Respondent's Exhibit B, that is operated manually?

(Testimony of Anthony Bush.)

A. Manually. There is a handle above it and you just pull that handle.

Q. Could you indicate on there what the main contactor is?

A. This is the main contactor here.

Q. Would you put, say, a letter to indicate the main contactor? A. I will put "M and C."

Q. And this solenoid, would you indicate the solenoid on there, too?

A. It is right behind this here (indicating). You can't see it.

Q. The solenoid is behind the main contact?

A. Right straight under here. It isn't visible.

Q. Now, this process whereby you eliminate the limit switch, it is possible, as I understand your testimony, by jumping the [54] limit switch to operate the motor that drives the winch by the dead man switch, is that right?

A. Well, doesn't operate it direct because it is operated through this contactor. In other words, the limit switches simply interrupt a circuit to the solenoid to that main contactor.

Q. The limit switch interrupts the circuit from the dead man switch to the contactor?

A. That is right.

Q. Now, the conditions that have to be present, then, would have to be that the disconnecting switch would have to be in? A. Yes.

Q. Then you would have to do something to jump the limit switch? A. Yes, sir.

Q. And if that is done, even though the life-

(Testimony of Anthony Bush.)

boat is in position, you can operate the motor from the dead man switch? A. Yes, sir.

Mr. Collett: That is all.

Redirect Examination

By Mr. Ryan:

Q. Mr. Bush, assume the men are out working the winch and the drum by hand. Assume the lifeboat is in its nest. What is the only way of starting that motor?

Mr. Collett: Oh, if the Court please, we have been all over this three or four times. The witness has cross-examined, [55] re-examined, and recross-examined. He is just going all over the same questions.

The Court: All right.

Mr. Collett: I further object to the question. He is again using the word "Only."

Mr. Ryan: He has already said that.

The Court: Go ahead.

Mr. Collett: He has testified to the contrary.

A. The disconnecting switch or knife switch would have to be closed. In other words, to vary the current it would have to have that main contactor in the closed position.

Q. (By Mr. Ryan): Is there any other way of starting that motor?

A. No, sir, outside of that.

Q. That is right, I show you Respondent's Exhibit B, and you have indicated the limit switch on there by two metal handles.

(Testimony of Anthony Bush.)

A. Copper handles.

Q. Now, with the lifeboat in its nest we can eliminate the dead man control, you say, and not having anything to do with operating the motor?

A. That is right.

Q. Suppose there is a man at the controls and he wanted to start that motor, what would he do with that limit switch? Would he pull that out or would he push it in, that contactor? [56]

A. That limit switch?

Q. No, no, no. These two switches.

A. He would have to have that in. That doesn't come out of its own accord. That stays wherever you have it, either closed or open.

Q. In order to start that motor, would a man push it in or would he pull it out?

A. This knife switch would have to be pushed in.

Q. Would he have to do anything else?

A. Well, with that in, then he would have to push this in here.

Q. Push a button?

A. No, that is not it. That's got all these contacts on it.

Q. Push the plate in, you mean? A. Yes.

Q. One plate? A. Yes.

Q. Could that be done—so that we understand it, could that operation be done in, say, five seconds?

A. Well, you would have to open the panel upstairs.

Q. Assuming the panel is opened and the man

(Testimony of Anthony Bush.)

standing there, could he perform that operation to start that motor of the number 5 winch in five seconds?

A. Just as quickly as takes me to reach his hand up there and push it in.

Q. Then is the answer yes or no, he could do it in five seconds? [57]

A. Oh, yes, he could if he is standing there.

Mr. Ryan: That is all.

Recross-Examination

By Mr. Collett:

Q. Mr. Bush, is that the usual or an unusual procedure? A. Very unusual.

Q. Very unusual? A. Yes.

Q. For an electrician it would be extraordinary, wouldn't it?

Mr. Ryan: I object to that on the ground that calls for a conclusion and opinion.

The Court: I will allow it. He is an expert.

Mr. Collett: Read the question.

(Question read by the Reporter.)

A. Yes, sir.

The Court: Is that all?

Mr. Collett: Just possibly one more question:

Q. (By Mr. Collett): I am trying to understand what you have in mind when you, in response to counsel's question, use the term "only way." I understand with that switch in, the knife switch, disconnecting switch, if you jump the limit

(Testimony of Anthony Bush.)

switch, then the motor can be operated from the hand rail? A. Yes.

Q. Obviously that hand switch is kind of a master switch? [58] A. That is right.

Q. That has to be in to get any juice at all.

A. That is right.

Q. Now, the knife switch, the disconnecting switch being in, this extraordinary procedure of poking a finger or pencil or something in this main contactor might start it, or if the limit switch is jumped and it is operated from the hand rail, from the dead man switch, is that right?

A. That is right.

Q. That is what I understand your testimony to be?

Redirect Examination

By Mr. Ryan:

Q. I don't understand your testimony that way. You mean a man could climb aloft underneath the lifeboat in its nest and work a switch from up there? A. No, sir.

Q. That is what counsel thinks you mean, I think. A. No, sir.

Q. Which and what did you mean when you answered his last question?

A. When we talked about jumping a switch we mean by simply taking the two pieces of wire and bringing the wire around the switch to by-pass the switch. That is how we call jumping the switch. Manually that could not be operated because we would have to lift the bolt up. [59]

(Testimony of Anthony Bush.)

Q. In order to perform that operation Mr. Collett is talking about you would have to lift the boat up?

A. You would have to get the boat out of that position because the weight of the boat is pressed down on the limit switches and disconnects the main contactor.

Q. When you made your investigation, Mr. Bush, the next day, was the boat, so far as you know, in the same position it was at the time of the accident or had it been moved?

A. When I was there it was in the next.

Q. It was in the next? A. Yes, sir.

Q. Were all the cables in their shivs?

A. Yes, sir.

Q. Here is what I want to understand: Do I understand correctly if the lifeboat is in the nest you are unable to perform that operation of jumping the limit switches, is that correct?

A. Manually. You have to do it physically with a wire, which is not any procedure to do. I mean, it isn't the correct procedure.

Q. Of course you had no evidence anyone did that, did you? A. No, sir.

Mr. Collett: Oh, I object to this, if the Court please.

Q. (By Mr. Ryan): If you had a lifeboat in the nest and if somebody had gone through that extraordinary procedure of [60] putting a wire to jump the limit switches, how would these men even

(Testimony of Anthony Bush.)

under those circumstances up there at the limit switch start the motor?

A. The same man? It would be impossible. He couldn't reach it.

Q. Then is there any way of operating the limit switch underneath the lifeboat, with the lifeboat in its nest, is there any way to make energy go from there to the motor directly from the limit switch?

A. No, sir.

Q. Then I don't understand what you mean by answering Mr. Collett's question that you could by jumping the limit switch start the motor from the limit switch underneath the lifeboat.

Mr. Collett: He didn't say that.

A. No, I stated from the dead man switch, is what I understood him to say.

Q. Oh, I see what you mean. In other words, if somebody went through the extraordinary procedure of putting a wire underneath the limit switch——

A. There are two of them limit switches, incidentally.

Q. Two of them operate in one lifeboat?

A. Yes.

Q. He would have to do that for both switches?

A. That is right.

Q. If somebody did that, and if somebody went over to the [61] dead man control on the rail and held his hand on it, then he could have started the motor?

A. Yes.

Q. But you would have to have those three fac-

(Testimony of Anthony Bush.)

tors present jumping both limit switches and holding your hand on the dead man control?

A. Yes, and the disconnecting switch would have to be in.

Q. Yes, those so-called knife switches in the control room? A. Yes.

Mr. Ryan: That is all.

Mr. Collett: That is all.

(Witness excused.)

Mr. Ryan: Mr. Sinclair, please.

The Court: Gentlemen, I have had a long day. Can this witness come back tomorrow?

Mr. Ryan: I wonder if we might eliminate one witness maybe by stipulation before we conclude? I have Mr. Brown from Westinghouse. He is one of the helpers. He wasn't in electrical engineering, but he helped this last witness to make the test and found nothing wrong with the electrical equipment.

Mr. Collett: Well, I will stipulate there was nothing wrong with the electrical equipment.

Mr. Ryan: Then he won't have to come back.

The Court: When you say there was nothing wrong with the [62] electrical equipment, you mean in principle?

Mr. Ryan: They made tests to find out if there was anything, any defect in it that might cause this accident, and found nothing.

The Court: I tried an electrical case here and I have been through this electricity business three or four times. What is your theory, Mr. Collett, as to how it happened?

(Testimony of Anthony Bush.)

Mr. Collett: If the Court please, I don't know. I don't know just how the thing could happen. It seems to me it just might be deliberate. The witnesses testified that by sticking a finger in that main contact that you could cut through the dead man switch and the limit switch, but——

The Court: Well, you could apply that to the disconnecting switch. Either there was negligence or *res ipsa loquitur*. This thing just didn't happen. I have been through too many of these things. I am not too much concerned as to that aspect. I don't want to prejudge matters, but I have been all through them. There isn't much question. This man was killed.

Mr. Ryan: That is right.

Mr. Collett: No question about that.

The Court: He didn't commit suicide and no one murdered him.

Mr. Ryan: No.

The Court: I am satisfied of negligence. Where do we start from there? [63]

Mr. Ryan: Then I will put the widow on in the morning and her testimony won't take five minutes.

The Court: All right. Adjourn until tomorrow morning, ten thirty in the morning. At ten thirty we will go ahead.

(Thereupon this cause was adjourned to Friday, May 26, 1950, at the hour of 10:30 a.m. and thereafter further adjourned to June 6, 1950.) [64]

June 6, 1950—10:00 A.M.

The Clerk: Case of Rina Maria Vatuone vs. the United States, on trial.

Mr. Ryan: Ready, your Honor.

Mr. Collett: Ready.

Mr. Ryan: If it please your Honor, you will recall when this trial came up the last time your Honor made the statement that it looked to the Court at that stage of the proceeding that this was a *res ipso loquitor* case. I have done a little research on the law since that time and I have come to that conclusion, but in order to bolster this and to prove exclusive control on the part of the defendant of the panel that operated the switch for light No. 5, I want to offer in evidence a deposition of Henry W. Chandler, the ship's electrician, who had charge of the whole thing, which was taken on September 8, 1949, by myself on behalf of the Plaintiff.

Mr. Collett: Objected to, if the Court please. It was objected to at the time of the deposition that it was noticed under the wrong rule, and there is no showing here of compliance with the provisions of Section 639, Title 28, and it cannot be introduced in evidence, if there is no showing that the witness is not available.

Mr. Ryan: In answer to that I wish to say that United States Code, Title 28, Section 639, has to do with depositions *be bene esse*, which is still the rule in Admiralty. It merely provides that reasonable notice must be given to the opposition. [65] In the file we have the written notice of taking this

deposition which shows the notice to take the deposition is dated September 6, and the deposition was noted for September 8, two days later. Furthermore, your Honor, Mr. Collett on behalf of the Government appeared at the taking of the deposition and sat throughout the entire deposition. So first I contend that the notice of taking deposition was adequate because it was on two day's notice—

The Court: There was a decision that came down from Pennsylvania in the last several months. It appeared in the advance sheets of the Federal Rules Decision bearing upon depositions in Admiralty. The decision escaped my notice, I think you will find it, Mr. Collett, in more recent decisions. Who is this witness?

Mr. Ryan: This witness is the ship's electrician, the man who actually pulled the switch.

The Court: Where is he now?

Mr. Ryan: First I wish to say this: At that time we took his deposition on the ground he was leaving to go to sea, and he stated there he was going to sea. As far as I know, he is at sea. He is a marine electrician. He is not a shore side worker.

Mr. Collett: If the Court please, it was objected to at the time especially and consistently at the beginning of the deposition that the deposition was being taken not in accordance with [66] the proper rule. It appeared from the preliminary questions the witness would be gone for only a period of one month. In addition to the other objection, there is no showing here he is at sea, he is not outside

the jurisdiction of this Court to the extent of one hundred miles, or he has since ceased to be. There has to be some showing.

Mr. Ryan: I think your Honor has discretion in the matter and that an inference can be drawn from the fact that he is a seafaring electrician, that he is making regular trips to sea, and furthermore the Government should have him here if he is in San Francisco because he was their chief actor as far as this accident is concerned.

The Court: Before Mr. Collett urged substantially as follows. He objected to the deposition on the ground, one, that it was premature, that is, the taking of the deposition was premature, and on the further ground that the notice did not specify any of the conditions of Section 639, Title 28 of the U. S. Code. According to the notice the witness is a resident of the City and County of San Francisco. There has been no showing that he will not be here at the time of the trial, and Mr. Collett stated, "I have noted an objection in this case that it is premature to take a deposition." At this time I have nothing on the case, and that objection, of course, is not valid. I think as a matter of precaution, so there will be no possible claim hereafter of abuse of discretion on [67] my part, a determination be made as to the present whereabouts of this witness.

Mr. Ryan: Yes, your Honor. We may do that very quickly.

The Court: If the witness Chandler is absent from the jurisdiction, of course I will take the deposition and have that in the record.

RINA MARIA VATUONE

was called as a witness and testified as follows,
sworn:

Direct Examination

By Mr. Ryan:

Q. Where do you live, Mrs. Vatuone?

A. At 4452 Arlington Avenue, Santa Rosa.

Q. And at the time of your husband's death where did you live?

A. At 3350 Broderick Street, San Francisco.

Q. Were you appointed by the Superior Court of the State of California in and for the City and County of San Francisco, administratrix of the estate of Paul D. Vatuone, deceased?

A. Yes, I was.

Mr. Ryan: Your Honor, at this time I offer in evidence a certified copy of her letters of administration in that estate.

Mr. Collett: I would just like to take a look at it.

(The document was handed to Mr. Collett.)

Mr. Ryan: No objection, counsel states.

The Court: It may be marked.

(The certified copy of the letters of administration referred [68] to above was marked Libellant's Exhibit No. 1 in evidence.)

Q. (By Mr. Ryan): What was the relationship between you and Mr. Vatuone? Was he your husband?

A. Yes, he was.

Q. When and where were you married?

(Testimony of Rina Maria Vatuone.)

A. We were married at St. Finnebar's Church in San Francisco, on November 15, 1936.

Q. Were there any issue of said marriage, any children? A. Yes, there was a daughter.

Q. What is your daughter's name?

A. Paulette Vatuone.

Q. How old was Mr. Vatuone when he died?

A. 44.

Q. How old were you at the time of his death?

A. 37.

Q. And how old is your daughter Paulette at the time of his death? A. She was seven.

Q. Did you and Mr. Vatuone live together as husband and wife continuously from November 15, 1936, to the date of his death, June 15, 1949?

A. Yes.

Q. A period of almost 13 years.

A. Yes, that is right.

Q. Will you please tell his Honor what type of husband Mr. [69] Vatuone was?

A. He was a very good husband.

Q. Maybe I can help you a little bit. When you say he was a very good husband, did he work steadily?

A. Yes, he did. He was a good provider.

Q. Was he a sober man or an intoxicated person?

A. No, Paul never drank.

Q. He never drank at all? A. Never.

Q. Did he work, for instance, all through your married life? A. Yes, he did.

(Testimony of Rina Maria Vatuone.)

Q. Were you dependent upon him for your support? A. Well, yes I am.

Q. And was your daughter dependent upon him for support? A. Yes.

Q. How long had he worked for the United States Government at Fort Mason?

A. He worked from the beginning of 1942 'til November, 1946, and then he worked from November, 1946, until the end of 1947 for Sherry Liquor Stores.

Q. Yes?

A. And then he was again employed by the Fort Mason in 1948 and 1949.

Q. All right. Let us take 1949, the year that he died. He died on June 15 of that year, didn't he? [70] A. Yes.

Q. How much was he making from the Government during that year? How much a month?

A. It must average about—I can give you the round figures. The average I don't know. From the income tax notation that they sent me he had earned in 1949 a total of \$1448.

Q. \$1448—that is for six months of 1949?

A. Yes.

Q. Let me ask you this: In addition to his work for the Government at Fort Mason, did he augment his income by other work?

A. Yes, he had a part time job at the Murphy Liquor Store on Chestnut Street.

Q. Did he work there at night? A. Yes.

Q. He worked for Murphy's Liquor Store dur-

(Testimony of Rina Maria Vatuone.)

ing May and June, I understand, of 1949, didn't he?

A. Yes.

Q. How much did he earn in May at Murphy's Liquor Store?

A. It was \$56 and some odd cents.

Q. And how much did he earn in the two weeks of June that he lived?

A. \$42.40, I think it was.

Q. So between the two jobs, that is, working for the Government at Fort Mason and working for Murphy's Liquor Store, would [71] you say he averaged about \$300 a month? A. Yes——

Mr. Collett: I object to that, if the Court please. The figures speak for themselves.

The Witness: It is around \$300 a month. A little over that, I think.

Q. Let me ask you this: How much did he earn the entire year of 1946, for instance, where he worked for Sherry's Liquor Store?

A. I have the figures here. May I refer to them?

Q. Yes, I wish you would.

A. In 1946 he worked November 14th to December 31st and had a gross earning of \$478.20.

Q. That was for six weeks? A. Yes.

Q. How about 1947?

A. And for the full year of 1947 his earnings were \$3669.92.

Q. Tell me about Mr. Vatuone's health. What was the state of his health before he was killed?

A. Paul was in very good health.

(Testimony of Rina Maria Vatuone.)

Mr. Collett: I will object to that as calling for the opinion and conclusion of the witness.

Mr. Ryan: She could observe him.

The Court: Overruled.

A. Paul was in very fine health. [72]

Q. (By Mr. Ryan): For instance, take the year or two or three even before his death: Had he had any serious illnesses? A. No.

Q. Did he ever have any serious illness in his life while you were married to him?

A. In his married life, nothing, and just prior to our marriage he had his tonsils out and that was the only time he was sick to speak of.

Q. During your thirteen years of marriage did he work daily with the exception of Sundays, Saturdays and holidays?

A. Oh, yes, yes, he was always employed. At least if he were not employed he was out looking for it.

Q. How about his parents? Were they long-lived people or short-lived?

A. His father died—the age of the father was 45. In 1920 his father died. His mother is still living. She is a widow.

Q. How old is she about?

A. She is up in her seventies. I think she is 76.

Q. Do you know what his father died of at 45?

A. No, I am sorry, I don't know.

Q. That was many years ago—1920?

A. 1920.

Q. Generally speaking, you have shown us here

(Testimony of Rina Maria Vatuone.)

where his earnings for the last several years have approximated \$300 or thereabouts. During the 13 years of his marriage had his [73] earnings been more or less steady? I mean around that level or were they more or less?

A. During the war years his earnings were more than that because there was a lot of overtime.

Q. How much did he earn during the war years?

A. In the neighborhood of \$4000 and better. I am quite sure it was that.

Q. And then I suppose during the 1930's they were lower? A. Yes, they were.

Q. Now, let me ask you this: in regard to his relations with your child, did he show affection for the child? A. She was very dear to him.

Q. Did the child reciprocate that and show affection to him? A. Yes, she did.

Q. And was he good to you?

A. Yes, he was.

Q. And now, let me ask you this on another subject matter, Mrs. Vatuone: he died on June 15, 1949, didn't he? A. Yes, he did.

Q. Within a short time of that time did you hear from anyone connected with Fort Mason as to what your rights were or as to what you should do under the circumstances?

A. I was told to get in touch with a Mr. Sutherland at Fort Mason.

Q. When were you told that? [74]

A. The week following the funeral.

Q. Who told you to do that?

(Testimony of Rina Maria Vatuone.)

A. Well, this receptionist at the hospital that notified me of Paul's death.

Q. Where was he taken? To the Marine Hospital?
A. Yes, he was.

Q. And the receptionist at the Marine Hospital told you to contact Mr. Sutherland at the Marine Hospital?

A. Yes. I was upset at the time and she said, "He will tell you where to go and help you out." And so I contacted him the following week.

Q. You went out to Fort Mason and contacted Mr. Sutherland?
A. Yes.

Q. Did you have a conversation with Mr. Sutherland?
A. Yes, I did.

Q. That was about a week after your husband's death?

A. Yes, it was the following week. The funeral was on Saturday and I started to work on it the following week.

Q. This was at the United States Government office at Fort Mason, was it?

A. I believe the building number was 207.

Q. Was anyone else present besides Mr. Sutherland and yourself when you had this conversation that you are about to relate?

A. Well, there were other office workers in the office but they were busy with their own work. They were not talking directly [75] to me.

Q. Were you seated at Mr. Sutherland's desk when you had this conversation?
A. Yes.

Q. What did Mr. Sutherland say to you?

(Testimony of Rina Maria Vatuone.)

A. Well, he said that he was at my disposal as to helping me with these various government forms that were to be filled in, and he asked me personal questions as to my children and myself and my husband, and then I was to make application for compensation and for whatever benefits were to be given to me.

Q. Did he prepare any forms of application for compensation for you to sign at that time or did that come in at another time?

A. As I remember correctly, he put down the information and then said that his office worker would type it for me and then I could sign it.

Q. Did you sign anything that day?

A. No, I came back the second time.

Q. Have you related all the conversation that occurred on this first visit?

A. Well, I can't remember all of it, but I could remember the important sections of it.

Q. Have you related all of the important sections of it?

A. The thing that I wanted to know was in the event that I brought suit, would the claim for compensation affect it in [76] any way, and I was told, well, whatever the award would be, the amount of compensation I would receive in the interim would be deducted from that award and I would be allotted the remaining amount.

Q. Did you have any knowledge personally yourself at that time as to what the law was with regard to your rights in this matter?

(Testimony of Rina Maria Vatuone.)

A. No, I myself did not, so I contacted my attorney, Mr. Robert McMahan, to help me out.

Q. How long was it after that that you contacted Mr. McMahan?

A. I think it was the week following that.

Q. Did you believe the statements that Mr. Sutherland told you, that is, that you had the right to make application for compensation and also bring suit, and the compensation award would be deducted from the amount that you recovered in the suit? Did you believe those statements of his to be true?

A. Yes, I believed it because he seemed to be a person in the service. There was no reason for him not to tell me what was right.

Q. Did you, so far as you know, come back another time and sign an application for compensation?

A. Yes, I did.

Q. Do you know when it was that you did sign this application?

A. It was around the 23rd of that month, if I am right. I have no recollection of the exact date. [77]

Q. After you contacted Mr. McMahan—that is Mr. Robert McMahan sitting here, is it not?

A. Yes, it is.

Q. As your attorney, then you ascertained that he had some conferences with myself, didn't you?

A. Yes.

Q. Afterwards were you informed by your attorneys that you could do both, that is, accept compensation and bring suit for damages?

(Testimony of Rina Maria Vatuone.)

A. Yes, you did advise me of that.

Q. And did you choose then to bring a suit for damages rather than accept compensation?

A. Yes, I did.

Q. Did you find out that your attorney under your instructions sent a telegram and he apparently——

Mr. Collett: If the Court please, let the witness testify. If he wants to testify, let him take the stand.

Mr. Ryan: I will prove this by Mr. McMahon. I will leave that aside. The complaint was signed by us. I will leave that out.

Q. Did you later on receive notice that the Bureau of Employee's Compensation did, on August 3rd, 1949, make an award of compensation awarding yourself and your daughter \$78.75 a month?

A. Yes, I received that and mailed it——

The Court: Excuse me. What was the date of that? [78]

Mr. Ryan: August 3rd, 1949, two days after the suit was filed.

Q. Is this a copy of the warrant that you received from the Bureau of Employee's Compensation? A. Yes, it is.

Mr. Ryan: I offer this in evidence, your Honor.

The Court: It may be marked in evidence.

(The document referred to was thereupon received in evidence and marked Libellant's Exhibit No. 6.)

(Testimony of Rina Maria Vatuone.)

Mr. Collett: No objection.

Q. (By Mr. Ryan): Shortly after receiving this award of compensation, did you receive a warrant in the sum \$118.12 that was supposed to cover the period from the time of his death until some time in August? A. Yes, I did.

Q. Did you accept that check of the Government's?

Mr. Collett: If the Court please——

The Court: I assume that the question is directed to the physical acceptance of the check as distinguished from the legal interpretation that may be placed upon it.

Mr. Ryan: Yes, your Honor.

Mr. Collett: I am trying to be patient, to get the story out, but if counsel wants to take the stand and testify, let him do so. Otherwise he should ask the witness the questions and let her testify. Objected to as leading. [79]

The Court: All right.

Q. (By Mr. Ryan): What did you do with that check? A. I sent it back.

Q. You sent it back to the Government at Washington? A. Yes.

Q. Later on did you receive one more check in the sum of \$78.75?

A. I sent both checks back.

Q. Did you ever receive any more checks from the Government other than those two that you sent back? A. Not for compensation, no.

(Testimony of Rina Maria Vatuone.)

Q. Have you ever used any compensation checks from the Government? A. No, I did not.

Q. And you only received those two that you sent back, is that correct? A. Yes, that is right.

Q. I show you a carbon copy of a letter dated August 19th, 1949, and addressed to Mr. William McCauley, Director of the Bureau of Employee's Compensation, and I will ask you if you requested the Government to comply with what I said in that letter? This is just for identification first.

A. Yes, I did.

Q. And that is a true copy of the letter, isn't it?

A. Yes, that is right. [80]

(Discussion between counsel.)

Mr. Ryan: Your Honor, counsel questioned me. The letter is dated August 19th, and in handwriting above it, it states, "Airmailed August 30th." I will have to take the stand to explain that. I offer this letter in evidence.

Mr. Collett: I will object to it at this time on the ground that no proper foundation has been laid.

The Court: Mark it for identification and you can take the stand.

(The document referred to was thereupon marked Libellant's Exhibit No. 7 for identification.)

Q. (By Mr. Ryan): And in answer to that letter did you receive this letter from the Bureau of Employee's Compensation dated September—

(Testimony of Rina Maria Vatuone.)

Mr. Collett: If the Court please——

Mr. Ryan: I withdraw the question.

Mr. Collett: Before we get Mr. Ryan's testimony into the record again, let us follow the procedure here.

Mr. Ryan: I have to take the stand on this because this letter is addressed to me and all the rest of the correspondence is with our office.

The Court: You might ask the general question of the lady whether she authorized you on her behalf to engage in the correspondence.

Q. (By Mr. Ryan): Mrs. Vatuone, can you tell the Court whether [81] you authorized me as your attorney to write to the Government rejecting the compensation checks?

A. Yes, I did authorize you to.

Q. And you knew I was doing that on your behalf?

A. Yes.

Q. And did you approve of that conduct on my part?

A. I did.

Mr. Ryan: That is all, your Honor.

The Court: We will take a short recess.

(Recess.)

Mr. Collett: If the Court please, in order to save some time, I have what is known as the 201 file, the personnel file of the personnel division, San Francisco Port of Embarkation, on the employment of Mr. Vatuone, including the oath of office, and his various employments from the inception of Mr. Vatuone's employment down to the time of his

(Testimony of Rina Maria Vatuone.)

death. I have shown it to counsel and I will offer this in evidence as the employment record, as far as the Government is concerned, of the deceased as an employee of the United States.

The court: So ordered.

(The file referred to was thereupon received in evidence and marked Respondent's Exhibit C.)

Cross-Examination

By Mr. Collett:

Q. Mrs. Vatuone, you stated that it was about week after your husband's death that you had a conversation [82] with Mr. Sutherland?

A. I believe it was a week, yes.

Q. You were informed by the receptionist, was it, at the Marine Hospital, or at Fort Mason? Where was the receptionist?

A. I was called in to the hosiptal, and I don't remember the name exactly. I think it was Mrs. Harris,—

Q. Mrs. Harris?

A. Told me to get in touch with Mr. Sutherland, and in the meantime Mr. Sutherland, I think, was trying to get hold of my home by telephone, and we finally got together. He told me to come to Building 207, Fort Mason, to fill out these papers.

Q. And your best recollection of that date is about a week after your husband's death?

A. Yes, I think it was during the next week. Things were in such a state, I don't exactly re-

(Testimony of Rina Maria Vatuone.)

member the date, but I think it was at that time.

Q. You say that was Building 207 at Fort Mason you went to see Mr. Sutherland?

A. I think that was the address.

Q. And that was the first time that you had an interview with Mr. Sutherland? A. Yes.

Q. That was the first time that you saw the man, is that right? [83]

A. Yes, that is the first time I met Mr. Sutherland.

Q. Could you tell us again now just what Mr. Sutherland said to you in that conversation that you had and what you said to him, to the best of your recollection?

A. I don't remember the details and each question and answer, but the part that seemed important to me and important to this case is if I received the compensation I could still bring suit because the amount of the compensation would then be deducted from the award and I would get the remainder or the balance of the award at the time the suit was adjudged or finished.

Q. Did you have any discussion about that statement after your conversation with Mr. Sutherland with anyone other than Mr. Sutherland?

A. I discussed it with Mr. McMahon, my attorney.

Q. What did you tell Mr. McMahon that Mr. Sutherland had said to you?

A. The same thing that I told you now.

Q. And that is, that if you took the compensa-

(Testimony of Rina Maria Vatuone.)

tion, that if you recovered from the Government by any other means, that whatever payments you might have received would be deducted as against whatever other recovery you made, is that right?

A. That in substance is right. In other words, supposing I had gotten a \$2000 award after suit. If I had received in the interim \$1000, I would then get \$1000, being the balance [84] of my judgment. That is the way that I understood it.

Q. Did Mr. Sutherland say that to you?

A. He did not testify any amounts, no, but in substance that is what it amounted to.

Q. Did Mr. Sutherland say anything about a suit?

A. He said, "You have the privilege of bringing suit, but in the interim you have to live on something, and the compensation that you receive will then be deducted from the award."

Q. Did he say specifically that you had the privilege of bringing suit? A. Yes.

Q. He said that, and that you have to live on something in the meantime? A. Yes.

Q. That was the first conversation that you had with him when he made such a statement?

A. Yes.

Q. Then you proceeded to discuss the matter of filing a claim for compensation?

A. Yes. There was a form that I had to fill in. So he asked me the questions and I filled in whatever form I had for him.

(Testimony of Rina Maria Vatuone.)

(Mr. Collett handed a document to Mr. Ryan.)

Mr. Collett: I am going to offer the whole thing for identification.

Mr. Ryan: Counsel states he is going to offer this in evidence, I have no objection to that portion he showed me. [85]

Mr. Collett: You can object when it comes to the point.

Mr. Ryan: I have no objection to counsel offering the page which she signed, and the one he has showed me, which is her application. I am going to object to the whole file, which I will explain to your Honor later if he offers it.

The Court: There is nothing before this Court. What counsel is going to object to or is not going to object to is wholly immaterial at this point. I want this marked for identification. It may be marked.

Mr. Collett: It is an authenticated copy from the Federal Security Agency of the Federal Security Agency file.

The Court: It may be marked.

(The file referred to was thereupon marked Respondent's Exhibit D for identification.)

Q. (By Mr. Collett): Mrs. Vatuone, I show you a portion of Respondent's Exhibit D for identification. That is CA-5 form entitled "Claim for Compensation on Account of Death." I ask you

(Testimony of Rina Maria Vatuone.)

to identify your signature at the bottom of that form.

A. Yes, that is a photostatic copy of my signature.

Q. That is a photostatic copy of your signature, is it? A. Yes.

Q. That is the form, is it not, that was discussed with you at your first visit with Mr. Sutherland?

A. I don't know whether it was my first or second visit, but it looks like the form. The questions seem to be answered the [86] way I answered them.

Q. Subsequently after your signing the form did Mr. Sutherland obtain a copy of the certificate of marriage and the abstract of marriage record and record at St.—what hospital was it that Paulette was born in? A. St. Francis.

Q. St. Francis Hospital, certifying that she was born on the 17th of April, 1942, and the certified copy of the death certificate of your husband to attach to the document?

A. Yes, I had to obtain those.

Q. Did you obtain them yourself?

A. Some Mr. Sutherland got for me; others I had to secure for myself.

Q. I show you an affidavit relating to representatives of the deceased's beneficiaries, and likewise ask you to identify the photostatic copy of your signature. A. Yes.

Q. Was that document made out by you?

A. Yes, I made this out.

Q. And that was sworn to by you as an affidavit

(Testimony of Rina Maria Vatuone.)

on the 28th of June, 1949, before Anna Pritchard, is that right? A. Yes, that is right.

Mr. Ryan: May I see what you referred to, please?

Mr. Collett: Mrs. Vatuone, were you informed as to the amount to which you were entitled subsequent to the amendment [87] of the compensation act of October, 1949?

Mr. Ryan: I object to that, your Honor, on the ground that it is incompetent, irrelevant and immaterial. Subsequent to the bringing of this law suit, and on October 14th, 1949, the compensation act was amended and the amounts thereof were liberalized, and I object to that on the ground that it is incompetent, irrelevant and immaterial, because prior to that time she made her election to bring the suit rather than to proceed by compensation, and she never did get anything out of the new law. So I make that objection.

Mr. Collett: If the Court please, the compensation act provides—and I am referring now to Public Law 357, Section 303(g)—as follows:

“The amendment made by Section 201 of this act to Section 7 of the Federal Employees Compensation Act making the remedy and the liability under such Act exclusive except as to masters or members of the crew of any vessel shall apply to any case of injury or death occurring prior to the date of the enactment of this——”

(Testimony of Rina Maria Vatuone.)

Mr. Ryan: Just a moment, your Honor, may I interrupt, now, your Honor? I submit this is improper cross-examination and is calling for the conclusion of the witness, as he is asking the witness questions concerning this law. I suppose that at the conclusion of the case that we are going to argue [88] the effect of the law.

The Court: What was the question, counsel?

Mr. Collett: The question I asked was if she was informed as to the amount of compensation to which she is entitled under the award as a result of the enactment of Public Law 357. I did not use the specific designation. I simply referred to the amendment to the compensation act, as of October——

The Court: You can address a question to her as to any conversation she may have had with this gentleman whose name has been referred to concerning any expectation she may have had in the future under any particular law so discussed. Her interpretation, of course, would not help me.

The Court: Did you have any discussion with this gentleman about any future compensation you might receive under any amendment or amendments to the law as it then existed?

A. No, we had nothing said about that.

Mr. Collett: Counsel made an objection, and in order that the Court might be informed he stepped in before I had finished. I am not arguing the law. I am simply addressing myself to the objection that

(Testimony of Rina Maria Vatuone.)

was made, and I think the question is proper and that the provisions of the compensation act itself that any person—I would like to read on further if I may——

The Court: There is no objection?

Mr. Ryan: No.

Mr. Collett (Reading): “That any person who has commenced [89] a civil action or an action in Admiralty with respect to such injury or death prior to such date shall have the right at his election to continue such action notwithstanding any provision of this act to the contrary, or to discontinue such action within six months after such date before final judgment, and file claim for compensation under the Federal Employees Compensation Act as amended within the time limited by Sections 15 to 20 of such act or within one year after the enactment of this act, whichever is later. If any such action is not discontinued and is decided adversely to the claimant on the ground that the remedy and liability under the Federal Employees Compensation Act is exclusive or on jurisdictional grounds or for insufficiency of pleadings, the claimant shall, within the time limited by Sections 15 to 20 of such act, including any extension of such time limitations by any provision of this act, or within one year after final determination of such cause, whichever is later, be entitled to file a claim under such act.”

I think the whole matter of the understanding of the Libellant in this action in regard to the

(Testimony of Rina Maria Vatuone.)

compensation act is a matter before this Court, and the question as to whether or not [90] she is entitled to any recovery, whether she understands the fact that the claim entitled her to a certain award and by act of Congress that award was increased I think is a matter that should be before the Court as to whether she knows it.

Mr. Ryan: Your Honor, she has already answered she had no such conversation with regard to proposed changes in the law.

Mr. Collett: Oh, no, she has not. The Court asked her with regard to Mr. Sutherland.

The Court: You might ask her the questions if she has knowledge concerning the matter.

Q. (By Mr. Collett): Are you informed as to the amendment made by Congress in October of 1949, Public Law 357 as affecting the award which is introduced in evidence as Libellant's Exhibit No. 6? A. Yes, I am aware of it.

Q. Under that amendment under Public Law 357 is the amount to which you are entitled per month as compensation the award that was made?

Mr. Ryan: I object to that on the ground that that calls for her conclusion, not the best evidence, and on the ground that it is incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Collett: She said she was informed. I am asking her of what she was informed. [91]

Mr. Ryan: Also I object on the ground of hearsay.

(Testimony of Rina Maria Vatuone.)

The Court: Sustained.

Mr. Collett: If the Court please, I think it is an important matter.

The Court: You can indicate the amount according to the schedule whatever it may be and counsel will stipulate to it. What effect is that going to have on my determination of this case? I cannot see the immediate relevancy as to what future expectation she may have with respect to compensation under an amended act. Did you read *Johnson vs. the United States* which came down recently in the advance sheet?

Mr. Collett: Yes, your Honor.

The Court: I happened to read it over the holidays.

Mr. Ryan: I think it is very pertinent to this case.

The Court: It is very edifying. It goes into the question of the election of remedies under the old law.

Mr. Ryan: Yes.

Mr. Collett: A quick blush on this question leads one down false alleys. Loose language is used by all the courts because the matter is not properly thought through.

The Court: Counsel, I am only indicating to you that *Johnson vs. the United States* is an opinion from what presumably is an appellate tribunal. The circuit escapes me.

Mr. Ryan: The Ninth Circuit, Judge Bone.

(Testimony of Rina Maria Vatuone.)

The Court: The Ninth Circuit, Judge Homer T. Bone. [92]

Mr. Ryan: I have it in the Weekly Law Digest.

Mr. Collett: If you are referring to Johnson vs. the United States of America, Herbert L. Johnson, which appears at 1950 AC——

The Court: It just came down, counsel, I can't recall the citation.

Mr. Ryan: It was decided April 7, 1950.

The Court: It had to do with the question of election of remedies, and it reviewed practically all the authorities. There are two Johnson cases in the circuit. There is one Johnson case that came down two or three years ago on which our distinguished Justice Orr wrote the prevailing opinion and it had to do with the doctrine of *res ipso loquitur*, the question of a dropping of a load off a winch. In that case the trial court was reversed. That is one Johnson case. The other has to do with the election of remedies.

Mr. Ryan: Here it is, your Honor. It is United States against Johnson, Volume 4, page 167, of the Weekly Law Digest. It was not Judge Bone; it was Judge Pope, Ninth Circuit, who decided it April 7th, 1950. In that case the Plaintiff was injured when the Navy automobile in which he was being driven by a Navy chief overturned on Guam. He was awarded damages under the Federal Torts Claim Act, and the questions arose——

The Court: That was my case. I tried that case. That is another matter. [93]

(Testimony of Rina Maria Vatuone.)

Mr. Ryan: That is a Johnson case. An employee has a right to sue the United States. In fact your Honor had another case similar to this, Lawson against the United States, in which your Honor awarded \$70,000 to an employee of the United States, and the question also involved there was whether his sole remedy was by compensation or whether he had a right to sue the United States under the same law under which we are suing here, the Public Vessels Act. That is in 1950 American Maritime cases.

Mr. Collett: If the Court please, we could go on again. There is also the Ferris case, the Griggs case, the Jefferson case, which are presently before the United States Supreme Court.

The Court: Counsel, I am not foreclosing you. I am looking forward with a great deal of pleasure to the moment when we launch into these arguments because I know you are well prepared. I have been away from this matter of Admiralty so long I need a little refreshment on the subject. But at the moment I cannot see that any question of this witness concerning the amendment of the act will aid me in solving this problem. If you have a different view, I will be glad to hear you out.

Mr. Collett: I think the Court should be informed as to the full circumstances surrounding a person who purportedly after making a claim for compensation and an award having been [94] made, and the Congress of the United States having increased the amount of that award, and subsequently

(Testimony of Rina Maria Vatuone.)

being prevailed upon by counsel to file a suit against the United States under the expectation that she might get something more, might hit the jackpot or find a pot of gold at the foot of the rainbow—I think it is of interest to the Court and of importance in the determination of the case and in appreciation and understanding of all the matters involved in the action that the information that was made available to claimant, the libellant in this action, should be before the Court.

Mr. Ryan: I say that is no matter of Mr. Collett's. It is a matter of this lady's choice. She chooses to proceed this way, the law gives her the right. She has a right, and I say it is irrelevant to bring that up as an issue in this case.

Mr. Collett: This Court is charged in seamen's cases with the responsibility of considering that the libellant as a seaman is a ward of the Court. The Court has great latitude in looking to the interests of libellants as such. In this particular case it is, of course, the Government's position, following your Honor's decision in the Garson case, which is on all fours and which follows the other cases which I have cited, that the decedent was not a seaman. However, we have an employee of the United States. We have an instance in which the Congress of the United States has seen fit in the first [95] instance to have enacted a compensation act and to have amended that compensation act. In the face of a great amount of speculation as to whether or not that compensation act was exclusive as to

(Testimony of Rina Maria Vatuone.)

such an employee as we have here—that is not getting into the member of the crew question, which is purportedly left in status quo by the express provision of the act—the Congress of the United States has made that act exclusive and retroactively exclusive and has allowed, and we perhaps might say, in its infinite wisdom and its consideration for all persons and their right, that the provision that I just read to your Honor, that in the event a person may have filed a suit prior to the time the act went into effect, that they continue prosecution of that suit. Purportedly if that prosecution is continued to the point where they received nothing on the merits, then they have lost their compensation as well as their expectation of recovery. Now, this compensation matter is a very important question for the Court to consider in the interest of the libellant that she understands or whoever it may be understands that when they have proceeded with the action, that they precluded themselves from receiving compensation. But again Congress in its wisdom, and having in mind apparently that there is a good deal of doubt about the exclusiveness of the compensation act as to such an employee as we have here, the argument is very strong. Granted in the seamen's cases, because of the provision that is in there, the matter has not reached a high enough Court to have it clarified. It may be [96] clarified by the time Jefferson, Ferris or Grigg cases have found their way through the Supreme Court. Perhaps the Supreme Court will clarify the

(Testimony of Rina Maria Vatuone.)

Brooks case and its status, but we have here an individual who is deceased, who was not a member of a crew, and is therefore not entitled to the exclusionary provision in the compensation act that allows a seaman to remain in his status quo. But the act now is exclusive as to every person who suffers an injury or to any heir who might endeavor to bring such an action as result of the death.

Mr. Ryan: I wonder if I might interrupt a moment? I see counsel is going into an extended discussion of the law. I have Mr. Powers here. He inquired of the electrician. It is almost twelve o'clock. I wonder if I can withdraw the lady so I can put him on?

Mr. Collett: That is very nice, but it is not going to take me long.

Mr. Ryan: Can't we argue this at the end of the case?

The Court: Let us hear it.

Mr. Collett: If any such action is not discontinued and is decided adversely to the claimant on the ground the remedy or liability under the Federal Employees Compensation Act is exclusive, Congress definitely had in mind that the Court can, could, might determine that that Federal Employees Compensation Act is exclusive, preserved to the claimant the right still to go on and obtain compensation. The only exception, of course, [97] where they would be precluded from any recovery is where it is determined on the merits that the Government was not liable in such an action under

(Testimony of Rina Maria Vatuone.)

the Public Vessels Act or the suits in Admiralty Act.

I say to the Court the whole matter surrounding the understanding of a person in such a position as this libellant is with regard to claims that are made and actions that are filed——

The Court: Is it your position that the amendment to the act works retroactively to the extent that it served to abate an action theretofore brought of this nature?

Mr. Collett: The express wording, if the Court please, if I understand the Court's question, to go back to the quotation "Provided, however—any person who has commenced a civil action or a suit in Admiralty with respect to such injury or death prior to such date shall have the right at his election to continue such action notwithstanding any provision of this act to the contrary, or to discontinue such action within six months after such date before final judgment and file claim."

The Court: Do you think, counsel, when you speak of Congress in its infinite wisdom—of course, I cannot subscribe to its infinite wisdom; I may subscribe to its wisdom—but when you say that Congress in its infinite wisdom had occasion to pass this legislation and allow for election, don't you think that Congress had in mind perhaps the wind-fall you speak of, the one that may be garnered out of the act itself of higher [98] benefits that might follow as distinguished from the ordinary lawsuit and the benefits that might follow? This lady is

(Testimony of Rina Maria Vatuone.)

in court. She seems content in this court. Counsel brought her here. She is apparently willing to rest her claim in this forum and under the circumstances I cannot see, one, how the action is abated; second, how she can be compelled to seek, as a result of subsequent legislation to declare an election otherwise than she has sought to maintain. That is my view on the matter. The law merely says she has an election within a period of six months to resort to the added benefits as distinguished from the rather infinitesimal amounts provided in the old act. Congress in its benign and infinitesimal wisdom saw fit to add to the benefits, which were so patently small and insignificant as to shock the conscience, I suppose, in many instances, having in mind the deflated value of the dollar. That is about the construction I place upon it. I am not going into any metaphysical distinctions about it. This is my view. Now you can place the man on the stand.

DAN G. POWERS

was called as a witness on behalf of the Libellant, sworn.

The Clerk: Mr. Powers, will you state your full name to the Court?

A. Dan G. Powers.

Direct Examination

By Mr. Ryan:

Q. Mr. Powers, after the earlier session [99] this morning did you make inquiry of the Govern-

(Testimony of Dan G. Powers.)

ment authorities at Fort Mason as to the present whereabouts of Henry W. Chandler?

A. I did.

Q. What did you find out as to his present whereabouts?

A. They tell me he is attached as assistant electrician to the U.S.S. Brewster, and they said the U.S.S. Brewster sailed from a San Francisco port on June 2nd west toward the Islands. They definitely could not say where the ship was at this time and could not say when it would return.

Q. When you say "the Islands," are you referring to the Philippine Islands and the Hawaiian Islands?

A. And Japan.

Mr. Ryan: That is all.

Cross-Examination

By Mr. Collett:

Q. Whom did you contact?

A. There was a series. I first called the home number. There was no answer. Then I called the Army, West 1-6111. They referred me to Prospect 6-2200, which is Fort Mason. At Fort Mason I told them my problem. They said the Aultman was sailing at 11 o'clock today, and that was ten minutes to eleven when I was on the phone. They tried to contact the Aultman. No answer. The girl said, "Try Yukon 2-3700, extension 15," which is the ship information. And from the ship's information at that number, a lady, after some time, came back with the information I just stated. [100]

(Testimony of Dan G. Powers.)

Q. Did you know that you were talking to the Military Sea Transport Service?

A. I got the information it was ship's information. That is the note I put down. I know it did say this, that they were not allowed to give it out except in writing. I told them the problem we were in.

Q. Did you inquire as to the assignment of Mr. Chandler?

A. Only that he sailed as assistant electrician on board the U.S.S. Brewster.

Q. And the Brewster sailed when?

A. June 2nd.

The Court: June 2nd, 1950?

A. Yes.

Mr. Collett: That is all.

Mr. Ryan: That is all at this time, Your Honor. I renew my offer in evidence of the deposition of Henry W. Chandler.

The Court: You may read the same and I will rule on the objections as you read it. We might take the noon recess, if agreeable. We will continue this case until two o'clock. [101]

Tuesday, June 6, 1950—2:00 P.M.

Mr. Ryan: May it please Your Honor, I would like to read into evidence certain excerpts of this deposition. I presume Your Honor has the original.

The Court: Yes, I have the original.

Mr. Ryan: The first part I want to read, Your Honor are the preliminaries beginning with page 4, line 1, to page 5, line 14, as follows:

“Q. What is your name?

“A. Henry W. Chandler.

“Q. Where do you live?

“A. 3961-A-24th Street.

“Q. San Francisco? A. That is right.

“Q. What is your 'phone number?

“A. Valencia 4-2068.

“Q. What is your age, if I might ask?

“A. 43.

“Q. What is your business or occupation?

“A. Army Transport electrician.

“Q. Now, you are an electrician connected with the United States Army Transport Service, is that correct? A. Yes.

“Q. Are you employed as an electrician on any vessel?

“A. I am now assistant electrician.

“Q. On what vessel?

“A. ‘General D. E. Aultman.’

“Q. That is the United States Army Transport ‘General D. E. Aultman’?

“A. That is right.

“Q. How long have you been employed as an assistant electrician on board that vessel?

“A. Since September 23rd of last year, almost a year. [102]

“Q. Now, as I understand it, that vessel just recently came into San Francisco, is that correct? A. Yes.

“Q. When did it arrive here?

“A. Tuesday.

“Q. That would be September 6th?

“A. That is correct, in the morning.

“Q. You came in from a voyage?

“A. Yes, from San Francisco to Yokohama to Korea and back to Yokohama.

“Q. Pardon me?

“A. Yes, from San Francisco to Yokohama to Korea and back to Yokohama.

“Q. When is that vessel going to leave San Francisco on its next voyage?

“A. The 16th of September.

“Q. Will it likewise go to Japan and Korea?

“A. As far as I know. It has not been definitely decided. I think we will go to Yokohama and return.

“Q. How long a trip will that be?

“A. Around thirty days.

“Q. As I understand it, that vessel after each trip stays in San Francisco or vicinity not to exceed ten days and then goes on another trip, which may last from thirty days to six weeks, is that correct? A. Yes.”

Page 14, line 1 to line 13 as follows:

“Q. When a lifeboat drill is in progress, is it one of your duties to be stationed at that control panel?

“A. When the boats are lowered.

“Q. What is that for?

“A. In case of emergency, [103] if the limit switch does not operate.

“Q. Had you had accidents before?

“A. Yes.

“Q. Men being crushed? A. Yes.

“Q. In other words, you were stationed there so, in case any of the switches were not operating properly, you could immediately turn off the power, is that right?”

“A. Yes.

“Q. During the entire progress of this boat drill you were there so you could perform that function? A. Yes.

“Q. And you were there, when this accident happened? A. Yes.”

Mr. Collett: I object, if the Court please, to any matter pertaining to any previous accident.

Mr. Ryan: Your Honor, I am not offering that for the purpose of showing how this accident could have happened, but only to show the necessity of the man being at the panel, and that is the only purpose.

The Court: The objection is overruled.

Mr. Collett: If the Court please, the question as such is directed to any previous accidents. There is no showing as to what accidents. It is wholly immaterial, irrelevant and incompetent as to this particular case and I do not think it is properly admissible.

Mr. Ryan: As I said, Your Honor, it is just to show the [104] purpose of his being where he was.

The Court: The objection is overruled. I am only interested in the fact that he was at a station as a result of the demands of his employment.

Mr. Ryan: That is right, Your Honor.

“Q. In other words, you were stationed there so, in case any of the switches were not operating properly, you could immediately turn off the power, is that right?”

Then I offer to read in evidence, page 10, lines 5 to 8 as follows:

“Q. At the time you noticed Vatuone lying unconscious on the deck was the knife switch on or off A. It was off.

“Q. Had you turned it off? A. Yes.

“Q. Immediately prior to that time it was on? A. Yes.”

Mr. Collett: If the Court please, I am going to move that that entire statement be stricken. It is a statement out of context. On the page previous the question was:

“Q. Now, at the time of the accident was the knife switch in the control panel, which would actuate the motor of number five winch, on or off? A. I don't know.”

The Court: I would suggest that you read that in.

Mr. Ryan: Your Honor, I thought counsel would take up what he wanted. I wish I could read the whole thing.

Mr. Collett: If the Court please, I want to renew my [105] objection to the entire deposition on the ground that it is inadmissible, but if the Court is going to overrule the objection, I would ask that the entire deposition be put in.

The Court: The objection is overruled. We will consider the whole deposition.

Mr. Ryan: Yes.

The Court: The deposition may be considered as read in evidence.

Mr. Ryan: The whole deposition is in evidence.

The Court: Yes, save and except that portion thereof which I struck with respect to prior accidents, and in that regard I state for the record that the reference to prior accidents is admissible only with respect the nature and gravity of employment and the demands if any that were then existent that the man remain at the post.

(The deposition referred to thereupon was received in evidence and marked libellant's Exhibit 8.)

LIBELLANT'S EXHIBIT No. 8

In the District Court of the United States, for the Northern District of California, Southern Division

No. 25476—R.

RINA MARIA VATUONE, as Administratrix of the Estate of PAUL D. VATUONE. Deceased,
Libellant,

vs.

UNITED STATES OF AMERICA,
Respondent.

DEPOSITION OF HENRY W. CHANDLER

Thursday, September 8th, 1949

Be It Remembered that, pursuant to Notice of Taking Deposition and Subpoena, and on Thursday, September 8th, 1949, at the hour of 2:15 o'clock

Libellant's Exhibit No. 8—(Continued)

(Deposition of Henry W. Chandler.)

p.m., at the offices of Messrs. Ryan & Ryan, 800 Phelan Building, 760 Market Street, San Francisco, California, before me, John M. Hally, a Notary Public in and for the City and County of San Francisco, State of California, personally appeared Henry W. Chandler, a material witness in the above-entitled action, who, being by me first duly sworn to testify to the truth, the whole truth and nothing but the truth, then and there testified as is hereinafter set forth.

Thomas C. Ryan, Esq., representing Messrs. Ryan & Ryan, and Robert McMahan, Esq. appeared as counsel for libellant.

Charles E. Collett, Esq., representing Hon. Frank J. Hennessy, United States Attorney, appeared as counsel for respondent.

Mr. Ryan: This deposition is being taken pursuant to Chapter 5 of the Rules of Civil Procedure for the District Courts of the United States.

Mr. Collett: Before you proceed any further, I object to the taking of the deposition on the ground the Rules of Civil Procedure do not apply. This is an Admiralty matter and Section 639 of Title 28 of the United States Code provides for the taking of depositions *de bene esse*.

Mr. Ryan: This deposition is taken pursuant to Notice of Taking Deposition, which has heretofore been served on the United States Attorney and upon a subpoena issued out of the United States

Libellant's Exhibit No. 8—(Continued)

(Deposition of Henry W. Chandler.)

District Court, which was heretofore served on the witness, Henry W. Chandler.

Well, all right, counsel has called to my attention Section 639 of Title 28 of the United States Code concerning the taking of depositions de bene esse. I submit the provisions of that Section have been followed. Reasonable notice was given to the United States Attorney that the deposition was being taken before a Notary Public, as provided for in the section. This witness is about to go on a voyage to sea.

Mr. Collett: Are you through now?

Mr. Ryan: Yes.

Mr. Collett: Well, I am objecting to the taking of the deposition at this time on the ground it is premature and on the further ground the notice does not specify any of the conditions of Section 639 of Title 28 of the United States Code. According to the notice, the witness is a resident of the City and County of San Francisco and there has been no showing he will not be here at the time of the trial.

Mr. Ryan: You have your objections in.

Mr. Collett: I am noting an objection in this case that it is pretty premature to take a deposition. At this time I have nothing on the case.

Mr. Ryan: I see what you mean.

Mr. Collett: I make the further objection that reasonable notice has not been given for the taking of the deposition.

Mr. Ryan: The notice was served on the United States Attorney on September 6th, 1949, in the

Libellant's Exhibit No. 8—(Continued)

(Deposition of Henry W. Chandler.)

morning that the deposition was being taken at 2:00 o'clock p.m. today.

Mr. Charles E. Collett, Assistant United States Attorney, is present.

Another thing I want to state for the record is that the deposition of an adverse or unwilling witness is being taken, as provided by law, and the plaintiff reserves the right to cross-examine and, if necessary, impeach him by other witnesses.

Mr. Collett: I object to the statement of counsel. The Admiralty Rules provide for the taking of depositions. They provide for methods of discovery. Any statement of counsel is objected to.

Mr. Ryan: Now, we can go ahead.

Mr. Collett: I appear on behalf of the United States. I am objecting to any further proceedings in the taking of this deposition and objecting to all questions that may be directed by counsel to the witness on the grounds I have previously stated and now state.

Mr. Ryan: All right, counsel, you have your objections in. They may be decided later on by the Court.

Q. What is your name?

A. Henry W. Chandler.

Q. Where do you live?

A. 3961-A 24th Street.

Q. San Francisco?

A. That is right.

Q. What is your 'phone number?

A. Valencia 4-2068.

Libellant's Exhibit No. 8—(Continued)

(Deposition of Henry W. Chandler.)

Q. What is your age, if I might ask?

A. 43.

Q. What is your business or occupation?

A. Army Transport electrician.

Q. Now, you are an electrician connected with the United States Army Transport Service, is that correct?

A. Yes.

Q. Are you employed as an electrician on any vessel?

A. I am now assistant electrician.

Q. On what vessel?

A. "General D. E. Aultman."

Q. That is the United States Army Transport "General D. E. Aultman"?

A. That is right.

Q. How long have you been employed as an assistant electrician on board that vessel?

A. Since September 23rd of last year, almost a year.

Q. Now, as I understand it, that vessel just recently came into San Francisco, is that correct?

A. Yes.

Q. When did it arrive here?

A. Tuesday.

Q. That would be September 6th?

A. That is correct, in the morning.

Q. You came in from a voyage?

A. Yes, from San Francisco to Yokohama to Korea and back to Yokohama.

Q. Pardon me?

A. Yes, from San Francisco to Yokohama to Korea and back to Yokohama.

Libellant's Exhibit No. 8—(Continued)

(Deposition of Henry W. Chandler.)

Q. When is that vessel going to leave San Francisco on its next voyage?

A. The 16th of September.

Q. Will it likewise go to Japan and Korea?

A. As far as I know. It has not been definitely decided. I think we will go to Yokohama and return.

Q. How long a trip will that be?

A. Around thirty days.

Q. As I understand it, that vessel after each trip stays in San Francisco or vicinity not to exceed ten days and then goes on another trip, which may last from thirty days to six weeks, is that correct?

A. Yes.

Q. I call your attention to June 15th, 1949. That was the date of this accident to Paul D. Vatuone?

A. Yes.

Q. Where was the "General D. E. Aultman" at the time of this accident?

A. As I remember, it was at the Oakland Army Base or Fort Mason.

Q. Wasn't it at the Oakland Army Base?

A. I don't know.

Q. It was tied up at either the Oakland Army Base dock or Fort Mason?

A. We left on the 17th. Was that the 16th?

Q. June 15th.

A. I think it was at Fort Mason.

Q. I think you are mistaken. It was in Oakland.

A. Was it?

Libellant's Exhibit No. 8—(Continued)

(Deposition of Henry W. Chandler.)

Q. Yes.

A. I know we went over a couple of days early. We usually stay in Oakland until a couple of days before we sail.

Q. Now, where did this accident take place on the vessel?

A. On the starboard side, by number five lifeboat.

Q. Now, was the starboard side alongside the dock? A. No, it was the seaward side.

Q. What deck was this on?

A. The boat deck.

Q. How many lifeboats are there on the starboard side of the boat deck?

A. Let's see now—one, three, five, seven, nine and eleven—I think in five, seven and nine cradles there were two each, one under the other.

Q. In other words, there were six lifeboats on the starboard side? A. That is right.

Q. What was in progress on that deck at the time of the accident?

A. Fire and boat drill.

Q. And in the fire and boat drill did the members of the crew move the lifeboats from their cradles in the davits?

A. Well, after the fire drill is when they let the boats over the side.

Q. Yes.

A. After the fire drill, the boat drill commenced.

Libellant's Exhibit No. 8—(Continued)
(Deposition of Henry W. Chandler.)

Q. At the time of this accident was the boat drill in progress? A. Yes.

Q. How far are they lowered?

A. To the water.

Q. You mentioned lifeboats one to eleven, one would be forward and eleven would be aft?

A. Yes.

Q. Number five is approximately amidship?

A. Yes.

Q. Now, was number five lifeboat being used in connection with the boat drill?

A. It was not used.

Q. Pardon me? A. It was not used.

Q. At the time of this accident where was number five lifeboat? A. In the cradle.

Q. In the cradle of the davits?

A. That is right.

Q. Now, was any work in progress on number five lifeboat or its tackles?

A. I don't know for sure. I think the riggers and machinists had the cable pulled out on the deck on the starboard side.

Q. One cable or two cables?

A. I think it was one long cable, which was around the drum.

Q. How long was that cable, approximately?

A. About 40 to 50 feet, somethink like that.

Q. I see. You say then that cable was wrapped around the drum of the winch?

A. Some of it was.

Libellant's Exhibit No. 8—(Continued)
(Deposition of Henry W. Chandler.)

Q. Is that the winch that was supposed to operate number five lifeboat? A. That is right.

Q. And where is that winch located with relation to the davits of number five lifeboat?

A. It is on the rail.

Q. You mean the davits are on the rail?

A. The motor is on top and the drum is underneath—they are against the rail.

Q. They were at the rail near number five lifeboat? A. That is right.

Q. Now, at the time of this accident did you notice that the riggers were operating number five winch manually, that is, by moving the handle, is that what you call it? A. Crank.

Q. They were moving the crank by hand, is that right?

A. I didn't notice they were moving the crank. My business is when the lifeboats are lowered down to the water, when they come back, I see that the limit switches are working.

Q. Maybe I better go into that. Has each of the six lifeboats a winch and motor close to it, to operate it? A. Approximately close to it.

Q. There is not one motor that operates them, each one has an individual winch and motor?

A. That is right.

Q. What switches could operate the motor of the number five lifeboat winch? Do you see what I mean?

Libellant's Exhibit No. 8—(Continued)
(Deposition of Henry W. Chandler.)

A. There are one, two, three switches. Only one switch operates the lifeboat, the rail switch.

Q. Which one? A. The rail switch.

Q. Where does the electricity start from?

A. From the engine room.

Q. What switches are in the engine room?

A. It is a breaker switch.

Q. A breaker switch? A. Yes.

Q. Now, does that breaker switch operate all the motors for the lifeboats?

A. On the starboard side only.

Q. The breaker switch in the engine room could operate any of the lifeboat motors?

A. On the starboard side.

Q. And from the breaker switch where does the electricity go? A. To the control panel.

Q. Where is that located?

A. On the starboard side, around midship.

Q. How far is the control panel from the number five motor? A. About 30 feet, maybe.

Q. And it is on the same deck? A. Yes.

Q. A man standing at the control panel, if looking, can see people working on number five motor?

A. That is right.

Q. Now, in the control panel is there one or more than one switch? A. Just one switch.

Q. One switch? A. Yes.

Q. How big is that control panel?

A. Number five has a small control panel.

Q. That is the one I am talking about.

Libellant's Exhibit No. 8—(Continued)

(Deposition of Henry W. Chandler.)

A. Three by three.

Q. Three feet by three feet? A. Yes.

Q. Now, at the time of this accident was the breaker switch on in the engine room?

A. It was at that time.

Q. In the control panel could you have the electricity on for five boats on the starboard side and leave off one, number five? A. Yes.

Q. How do you do that?

A. Pull a knife switch, it has two blades.

Q. Now, at the time of this accident was the knife switch in the control panel, which would actuate the motor of number five winch, on or off?

A. I don't know.

Q. You don't know?

A. I don't know when the accident happened.

Q. You saw Vatuone lying unconscious on the deck, didn't you? A. Yes.

Q. At the time you noticed Vatuone lying unconscious on the deck was the knife switch on or off? A. It was off.

Q. Had you turned it off? A. Yes.

Q. Immediately prior to that time it was on?

A. Yes.

Q. When you saw Vatuone lying on the deck, you pulled the knife switch?

A. When I told the fellows it wouldn't work with the boat in the cradle, the limit switch would not work, then I pulled the knife switch on the control panel.

Libellant's Exhibit No. 8—(Continued)

(Deposition of Henry W. Chandler.)

Q. You put it on? A. I took it off.

Q. Let me go back to the switches. In addition to the breaker switch in the engine room and the knife switch, what other switches would actuate the number five motor?

A. Just the rail switch.

Q. Where is the rail switch located?

A. On the rail.

Q. On the rail close to the davits of number five lifeboat?

A. It is right where the motor and drum are.

Q. How far from the rail switch is the crank of number five winch, when in position?

A. About three feet.

Q. Now, in addition to those three switches you have mentioned is there a fourth switch that has some bearing on the operation of number five lifeboat?

A. In the engine room, then you have the limit switch.

Q. Where is the limit switch?

A. Up on top of the cradle, it cuts the boat off.

Q. That switch is so high above the deck, a man standing on the deck can't reach it?

A. That is right.

Q. What is the function of the limit switch?

A. It stops the boat, when it hits the top of the cradle.

Q. Assuming a person had number five lifeboat

Libellant's Exhibit No. 8—(Continued)

(Deposition of Henry W. Chandler.)

in the water and wanted to lift it to the cradle, would you first put the rail switch on?

A. That is right.

Q. The boat would automatically go up to the cradle and the limit switch would shut off the motor?

A. That is right.

Q. That is the function of the limit switch?

A. Yes.

Q. This accident happened at 10:30 in the morning of June 15th. Prior to 10:30 in the morning, before the accident, did you see any riggers manually working number five winch?

A. I think I saw a lot of crew members around. All the crew members are on each boat. I think they were working.

Q. These riggers were not crew members?

A. That is right.

Q. How many were working on number five winch?

A. I don't know.

Q. Did you know any of them?

A. No.

Q. Did you know who their foreman was?

A. No.

Q. Prior to this accident did you have any conversation with any of the riggers in regard to turning the motor on for number five winch?

A. That is right.

Q. With which one of the crew members was that?

A. It was not one of the crew members.

Libellant's Exhibit No. 8—(Continued)

(Deposition of Henry W. Chandler.)

Q. Pardon me—I mean riggers. Do you know his name?

A. I don't know his name. The rigger told me to put the switch on or the juice on.

Q. You don't know the name of that rigger?

A. No.

Q. Did you know Paul Vatuone? A. No.

Q. Was he the one or someone else?

A. I did not think it was he. I think his name must be in the statement. The skipper took the same thing you are getting here.

Q. Who took the statement?

A. The Coast Guard or the skipper.

Q. Who was the skipper? A. Williams.

Q. Was he the captain? A. Yes.

Q. Do you know his first name? A. No.

Q. He was the master of the vessel?

A. Oh, no, pardon me—Frez, he was the skipper.

Q. Frez? A. Yes.

Q. What is his first name? A. Otto.

Q. Who is the Williams you mentioned?

A. He is the new skipper. He just came on this trip.

Q. He had nothing to do with it?

A. That is right.

Q. You say one of the riggers, not Vatuone, asked the skipper if the juice could be turned on?

A. He asked me.

Q. He asked you if you could turn the juice on to operate number five winch? A. Yes.

Libellant's Exhibit No. 8—(Continued)

(Deposition of Henry W. Chandler.)

Q. That was what wound up the cable on the deck? A. Yes.

Q. What did you tell him?

A. That the rail switch wouldn't work.

Q. In other words, when the boat is in the cradle, the rail switch will not work?

A. That is right.

Q. How long before the accident was this conversation, about?

A. It must have been five or ten minutes.

Q. Where were you, when the rigger asked you that? A. I was at the control panel.

Q. You were at the control panel?

A. I didn't stay there all the time. We have a cargo resister room and the exhaust motor taking the heat from the resister room was shorted out.

Q. That motor was shorted out? A. Yes.

Q. At the time of this accident?

A. Before.

Q. Why did you mention that?

A. I had something on my mind beside the boat drill. I had two portable fans in the resister room—my mind was occupied between the boat drill and the cargo resister room.

Q. Where was the cargo resister room located?

A. About ten to fifteen feet away.

Q. You had your attention centered on that, as well as the control panel? A. That is right.

Q. I might as well ask you this now—You were the electrician, who had charge of all motors and

Libellant's Exhibit No. 8—(Continued)

(Deposition of Henry W. Chandler.)

switches and panels on the starboard side at the time? A. Yes.

Q. Who was the chief electrician?

A. I've Matthews.

Q. Where was Matthews?

A. He was at number one cargo winch.

Q. When a lifeboat drill is in progress, is it one of your duties to be stationed at that control panel?

A. When the boats are lowered.

Q. What is that for?

A. In case of emergency, if the limit switch does not operate.

Q. Had you had accidents before?

A. Yes.

Q. Men being crushed? A. Yes.

Q. In other words, you were stationed there so, in case any of the switches were not operating properly, you could immediately turn off the power, is that right? A. Yes.

Q. During the entire progress of this boat drill you were there so you could perform that function?

A. Yes.

Q. And you were there, when this accident happened? A. Yes.

Q. Five or ten minutes before the accident one of the riggers asked you if you could turn on the juice to operate the motor of number five winch and you told you couldn't do it?

A. That is right. I explained to him why it

Libellant's Exhibit No. 8—(Continued)

(Deposition of Henry W. Chandler.)

wouldn't work. I went over and tried the rail switch.

Q. You left the control panel and went over to number five lifeboat?

A. I told him the boat was cradled. I tested the limit switch. It was all right.

Q. How did you do that, climb a ladder?

A. There are seats along the lifeboats, where they sit. They have a ladder there.

Q. You tested the limit switch? A. Yes.

Q. What did you find? A. It was all right.

Q. It was off? A. Yes.

Q. Then you tested the rail switch?

A. Yes.

Q. Did you find it off or on?

A. You have to hold it on with a spring. You have to keep your hand on it.

Q. In order to operate the rail switch, what do you do? A. Turn it to the left.

Q. You have to hold your hand on it, while it is being operated? A. Yes.

Q. You found the rail switch was off?

A. Yes.

Q. It was not actuating any juice into the motor?

A. That is right.

Q. How about the knife switch and the control panel, was that on for number five winch?

A. Yes.

Q. In other words, electricity was running through that? A. Yes.

Libellant's Exhibit No. 8—(Continued)
(Deposition of Henry W. Chandler.)

Q. Let me ask you this, if the rail switch was off, that is, no juice was going through it and if the limit switch was negative or silent, no juice was going through it and if a person standing at the control panel would press that knife switch, would that enable number five motor to operate?

A. No.

Q. You think not? A. Yes.

Q. You know at the time of this accident, the motor of number five winch was operating, do you not? A. I didn't see the motor operating.

Q. Do you know what caused this man to be thrown on the deck and knocked unconscious?

A. No.

Q. You didn't see the accident?

A. No, I didn't.

Q. Did you know that someone went over and turned off the motor on number five winch?

A. How could he turn it off. I didn't know it was on.

Q. You don't know of your own knowledge how this man was hurt, do you?

A. No. Here is my opinion——

Mr. Collett: Never mind your opinion.

A. We had a talk.

Q. (By Mr. Ryan): After you went over and tested the rail switch and the limit switch, did you walk back to your post at the control panel?

A. I walked back immediately and turned the knife switch off.

Libellant's Exhibit No. 8—(Continued)

(Deposition of Henry W. Chandler.)

Q. You put your fingers in, did you?

A. No, it has a handle.

Q. You reached with one hand and pulled the handle of the knife switch? A. That is right.

Q. Immediately after you pulled the handle of the knife switch you saw Vatuone unconscious on the deck? A. No.

Q. Within a very few seconds after you saw him? A. No.

Q. How long after did you see Vatuone lying on the deck?

A. I don't know just when it was. I think, when I pulled the knife switch, number seven boat was coming up in the cradle. I have to go to the rail to see what boats are coming up.

Q. You say you went back to the control panel, after you tested the rail and limit switches for number five winch? A. Yes.

Q. After you went back, you reached in and pulled the knife switch of number five motor?

A. Yes.

Q. How long after you pulled the knife switch did you see Vatuone lying on the deck?

A. I don't know.

Q. Was it a second or two?

A. I don't know.

Q. Approximately.

A. I don't know what happened. After the guy got killed, maybe I went to where the fans were. Maybe five or ten minutes.

Libellant's Exhibit No. 8—(Continued)

(Deposition of Henry W. Chandler.)

Q. The accident happened five or ten minutes after what?

A. After I pulled the knife switch.

Q. Pardon me, I thought you told me before the conversation, when the rigger asked you to turn on the electricity, occurred four or five minutes before the accident?

A. I don't know when the accident occurred. When I came back from seeing number seven boat come up, I saw the man lying on the deck. It might have been two or five minutes.

Q. Between two and five minutes after you pulled the knife switch, did you see him lying on the deck? A. I don't know.

Q.. Somewhere around there?

A. It might have been two, five or ten minutes.

Q. Since the accident you have been ordered to turn off the switches altogether, when the light boats are up in the davits?

A. That is right and pull the fuses too.

Q. So you can't have an accident like this?

A. Yes. I never saw the motor running.

Q. What did you do when you saw Vatuone lying on the deck? A. What could I do?

Q. I am not criticising you. I said, what did you do?

A. I waited until the fire and boat drill was over.

Q. Did you go up to Vatuone?

A. No, one of the medical sergeants was there.

Libellant's Exhibit No. 8—(Continued)

(Deposition of Henry W. Chandler.)

Q. Did the fire and boat drill continue?

A. Yes.

Q. Was there any interruption? A. No.

Q. Did you go over to the motor of number five winch?

A. After the accident I looked at the rail switch to see if it was working and if the control panel was working. The Chief Engineer told me to do that.

Q. If this motor of number five winch began to operate, you don't know of your own knowledge what caused it to operate, is that right?

A. Yes. No one else seemed to know either.

Q. Did you tell Mr. Powers on July 25th less than a minute elapsed between the time you pulled the limit switch and the time you saw Vatuone lying on the deck?

A. I told him it takes less than a minute to go back to the control panel from the rail switch.

Q. Do you know Jack Harris, the foreman of the riggers on the ship that day? A. No.

Q. You don't know if he was the man, who asked you to turn on the juice? A. No.

Q. Was there a machinist working by the name of Al Wood at the time of this accident?

A. I don't know.

Q. Do you know a fellow by the name of Sinclair?

A. No, I don't know any of the riggers or machinists.

Libellant's Exhibit No. 8—(Continued)
(Deposition of Henry W. Chandler.)

Q. Mr. Chandler, these were all Westinghouse motors, weren't they? A. That is right.

Q. You tested them right after the accident and found all switches and motors to be operating properly, is that correct?

A. As far as I know, they were.

Q. Were you present the next day, when Westinghouse representatives came on board and tested the motors? A. I was aboard.

Q. As far as your observation was concerned, could you say they found all switches were operating properly? A. Yes.

Q. Now, all the switches and motors are under the control of the ship's electricians, that is the Chief Electrician and yourself, as Assistant?

A. Yes.

Q. That is your job to see that these switches and motors work properly, isn't it? A. Yes.

Mr. Ryan: I believe that is all, Mr. Chandler.

Mr. Collett: I have no questions.

Mr. Ryan: Subject to your objections and if the Court holds this deposition may be used at the time of the trial, may it be used without the necessity of the witness signing it? I am trying to avoid bringing him back.

Mr. Collett: He will be back in a month.

Mr. Ryan: Very well.

/s/ HENRY W. CHANDLER.

Libellant's Exhibit No. 8—(Continued)

State of California,
City and County of San Francisco—ss.

I, John M. Hally, a Notary Public in and for the City and County of San Francisco, State of California, hereby certify that the witness, Henry W. Chandler, named in the foregoing deposition, was by me first duly sworn to testify to the truth, the whole truth and nothing but the truth in the above-entitled action; that the said deposition was taken on the 8th day of September, 1949, at the hour of 2:15 o'clock p.m., at the offices of Messrs. Ryan & Ryan, 800 Phelan Building, 760 Market Street, San Francisco, California; that it was taken down in shorthand by Neil H. Crawford, a competent shorthand reporter and a disinterested person, and by him transcribed into longhand typewriting; that after being so transcribed the same was read over by or to said witness, who, after correcting the same in such particulars, as he desired, subscribed the same in my presence.

And I hereby further certify that I am not of counsel nor in any way interested in the outcome of said action.

It Witness Whereof, I have hereunto set my hand and affixed my notarial seal this 12th day of September, 1949.

[Seal] /s/ JOHN M. HALLY,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed September 16, 1949.

Mr. Ryan: May it please Your Honor, there are a couple of more excerpts I want to call to your Honor's attention which I consider of importance. I want to call Your Honor's attention to page 9, lines 5 to 9, as follows:

"Q. How far is the control panel from the number five motor?

"A. About 30 feet, maybe.

"Q. And it is on the same deck?

"A. yes. [106]

"Q. A man standing at the control panel, if looking, can see people working on number five motor? A. That is right."

Then, your Honor, I call your attention to page 13, lines 22 to 24 as follows; I think I have this wrong. Oh, yes, I have it wrong. It is page 13, lines 22 to 24 as follows:

"Q. I might as well ask you this now: You were the electrician who had charge of all motors and switches and panels on the starboard side at the time? A. Yes."

On the same subject matter, page 19, lines 10 to 14:

"Q. Now, all the switches and motors are under the control of the ship's electricians, that is the Chief Electrician and yourself, as assistant? A. Yes.

"Q. That is your job to see that these switches and motors work properly, isn't it?

"A. Yes."

Your Honor, in view of the fact that the whole

thing is in evidence, those are the only parts I wish to call to your attention at this time.

The Court: The deposition appears to be signed by Henry W. Chandler.

Mr. Ryan: Yes, your Honor, and sworn to before a Notary.

I would like to put Mr. McMahan on. [107]

Mr. Collett: I have not finished with Mrs. Vatuone.

Mr. Ryan: I beg your pardon.

The Court: Mr. Mitchell, this may be marked and considered read.

RINA MARIA VATUONE

The Clerk: The witness on the stand is Rina Maria Vatuone, heretofore sworn.

Mr. Collett: At this time, if the Court please, I will offer in evidence the authentic copy of the record of the Bureau of Employee's Compensation, Federal Security Agency, relating to the case of Paul Vatuone, deceased, Transportation Corps, Department of the Army, San Francisco Port of Embarkation, Fort Mason, California, file No. X472308. The originals of these copies are now on file with the Bureau of Employee's Compensation, Federal Security Agency, located at 4th and Independence Avenue, Southwest, Washington, D. C. This is by direction of the Federal Security administrator, Leo A. Miller, executive assistant.

The Court: The purpose of this offer is to show, or an attempt to show an election on the part of the lady?

(Testimony of Rina Maria Vatuone.)

Mr. Collett: The purpose of this offer is to show the record as to the claim that was filed and the other papers in conformance with the claim and the record and file of the Federal Security Agency in accordance therewith.

Mr. Ryan: If it please your Honor, in regard to this offer, about 95 per cent of this I have no objection to whatever. [108] However, in one question here there is a showing as to what other property she and her husband had at the time of his death, and I think that that part is incompetent, irrelevant and immaterial. I think it is in the nature of a person, for instance, who is killed in an accident who has life insurance or accident insurance. I say, for instance, if we were trying this—not so much before the Court, but if there was a jury, for instance, I think that would be improper to show by way of a document like this that a person has so much life insurance or so much property. The only issue is as to the damages, and the only issue is the amount that that man was earning and whether he used the money on himself or in the support of his family and whether he had other property is an irrelevant matter. So with the exception of this showing of other property, I have no objection; as to the showing on the grounds of other property which is contained in a document called “Affidavit relating to Representatives of Deceased’s Beneficiaries,” I object to that on the ground that it is incompetent, irrelevant and immaterial to that matter.

(Testimony of Rina Maria Vatuone.)

Mr. Collett: If the Court please, the witness has identified her signature to an affidavit sworn to by her and it is a part of this file and record. I do not see where there is any objection.

The Court: The objection is overruled. Of course, it would seem to be elementary that any showing with respect to [109] accumulated wealth or property would have no bearing upon an ultimate award in this case. What relevancy does it have in connection with the investigation undertaken by the Commission?

Mr. Ryan: I do not really know why they asked that question.

The Court: Because it certainly does not enter into their award.

Mr. Ryan: Not a bit.

The Court: In any event, I cannot at present see the materiality and I shall not consider it in any determination that hereafter may be made if liability is found against the defendant United States of America.

The Clerk: Exhibit heretofore marked respondent's D for identification may now be marked as D in evidence?

The Court: Yes.

(Respondent's exhibit D for identification was thereupon received in evidence.)

Mr. Collett: In conjunction with that exhibit, I have a copy of a letter from the Federal Security Agency, Bureau of Employee's Compensation, by

(Testimony of Rina Maria Vatuone.)

the Chief Claims Examiner to Newell A. Clapp, acting assistant Attorney General, United States Department of Justice, dated April 7, in which the computations were made after the amendment to the Act, showing the amount payable to the widow effective as of November 1st, 1949. I would like to offer that along with the other portion of [110] the record.

Mr. Ryan: Your Honor, I am objecting to that on the ground it is incompetent, irrelevant and immaterial and as having to do with the amended compensation law, which she has not chosen to avail herself of.

The Court: Her asserted election had been made prior to that time, and the withdrawal of any application she made, prior to that time.

Mr. Ryan: Definitely.

Mr. Collett: That is a question for this Court to determine as to whether or not, assuming there was an election, that by virtue of the fact that the claim made and the various documents in support of the claim and an award having been made by the Bureau of Employee's Compensation in this case, dated August 3, and an action having been filed two days before, whether or not that in itself is not an election, assuming that there is an election. That contention is made, and the offer in support of it as carrying out the full conclusion——

The Court: As part and partial of your showing I will allow this, subject, of course, to the ultimate

(Testimony of Rina Maria Vatuone.)

interpretation of the Court with respect to the legal problem.

Mr. Ryan: I was just going to say that no matter which way your Honor decided, that would not be relevant because if your Honor decides she did make an election to file this damage [111] suit, she is in this Court properly, and if your Honor finds she did not make an election, she would be under the administrative agency of the Compensation Bureau.

(The exhibit last referred to was thereupon received in evidence and marked respondents' exhibit D-1.)

Cross-Examination

By Mr. Collett:

Q. Mrs. Vatuone, how soon after you had filed a claim did you consult with your attorney?

Mr. Ryan: Object to that on the ground that it is indefinite. She may have seen Mr. McMahan on many things not related to compensation claims.

The Court: I assume you mean when in point of time after filing the claim did this lady consult with Mr. McMahan on that subject.

Mr. Collett: That is correct.

The Witness: It was the week following my application at the Government office for compensation. [112]

Q. (By Mr. Collett): Had your husband left a will?

(Testimony of Rina Maria Vatuone.)

Mr. Ryan: I object to that on the ground that it is incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. (By Mr. Collett): Was your first visit with Mr. McMahon with regard to the compensation claim that you had filed with the Government?

A. My first visit with Mr. McMahon?

Q. Yes, after you filed the claim.

A. Yes, with regard to the compensation.

Q. When did you first ascertain that you could file an action against the United States?

A. When I talked to Mr. McMahon. That is when I ascertained I could file.

Q. Is Mr. McMahon the attorney of the estate of your husband? A. Yes, Mr. McMahon is.

Q. What did Mr. McMahon tell you about your rights as to the claim you had filed and suing the United States notwithstanding that claim?

A. I am sorry, I don't understand that.

(Question read.)

A. At the first meeting he said he would look into it for me.

Q. Did you ask him whether or not you could file a suit against the United States? [113]

A. Yes, I did.

Q. At the time you had the conversation with Mr. Sutherland did he read to you any provisions from a paper or a document and as he explained to you, filed the claim? A. I don't remember.

Q. You don't remember?

A. My mind was pretty much in a turmoil at

(Testimony of Rina Maria Vatuone.)

the time. I couldn't say I remembered yes or no.

Q. Prior to the death of your husband you had lived continuously with him, had you not?

A. Yes, I had.

Q. You had not filed any action for divorce or he had not filed any action for divorce against you?

A. No.

Q. Are you working at the present time?

A. No, I am not.

Q. Were you working at the time of his death?

A. No, I was not.

Q. How much did he usually contribute to the support of your household and to your support out of his paycheck?

A. Well, we lived with my mother-in-law. We paid no rent. My mother-in-law being a widow, we made our home with her, because she wanted someone in the house with her, and I received \$50 a week to cover groceries and incidentals and he took care of whatever doctor bills or clothing bills or whatever expenses [114] over food that we might need, over and above the \$50 week.

Q. With regard to the claim that you filed, in the event that an award was made on such a claim after you filed it, what did Mr. Sutherland advise you that you would receive, that you would be entitled to receive by way of compensation?

A. Well, I was to receive 35 per cent for myself as a widow and 10 per cent for the daughter.

Q. And how long was that to continue?

A. Until my little girl was 18 or until she was

(Testimony of Rina Maria Vatuone.)

married, and for my lifetime, or until I died, or remarried.

Q. When did you decide to file an action against the United States?

A. I don't remember the exact date. You would have to look at the paper to determine that. I don't remember the exact date I decided to do that.

Q. Was that your decision or were you advised so to do by your attorney?

A. No, that was my decision alone.

Q. Did you enter into a contract with your attorney as to what compensation he was to receive as a result of the recovery?

Mr. Ryan: Objected to on the ground that it is incompetent, irrelevant and immaterial. That is a matter between herself and the attorney.

The Court: I cannot see the relevancy. I will sustain the objection. [115]

Mr. Collett: That is all.

Redirect Examination

By Mr. Ryan:

Q. Just one question: Mr. Collett asked you about the fact whether or not Mr. Sutherland said you were going to get 35 per cent as a widow and your daughter 10 per cent as a daughter. Did he tell you that that was not 35 per cent of his salary but 35 per cent of \$175 a month? Do you remember that?

A. I don't remember the amount that he stated.

(Testimony of Rina Maria Vatuone.)

I understood it was 35 per cent for myself, 10 per cent for the daughter.

Q. What did you understand it to mean? 35 per cent of what?

A. I understood it to be 35 per cent of his wages at the time that my husband had died.

Q. Did he tell you that the wage, when considering this percentage under the law, would not exceed \$175 a month?

A. No, that did not enter into it.

Mr. Ryan: That is all.

ROBERT McMAHON

was called as a witness on behalf of the plaintiff and being first duly sworn testified as follows:

The Clerk: Your name is Robert McMahan?

A. That is right.

Direct Examination

By Mr. Ryan:

Q. Mr. McMahan, where do you live, please?

A. 1025 Green Street, San Francisco. [116]

Q. What is your profession?

A. Attorney-at-law.

Q. You are an attorney-at-law? Are you admitted to practice in all the courts of California and the Federal Court?

A. I am.

Q. How long have you been an attorney-at-law?

A. About 34 years.

Q. For many years were you connected with the

(Testimony of Robert McMahon.)

City Attorney's office with the City and County of San Francisco? A. 24 years.

Q. How much? A. 24 years.

Q. Mr. McMahon, you are one of the attorneys for the plaintiff in this action of Vatuone against United States? A. I am.

Q. Did Mrs. Vatuone, after the death of her husband, see you as an attorney?

A. She did.

Q. And because of seeing you as an attorney did she or did she not inquire as to whether or not she had a right to sue the Government for damages for the death of her husband? A. She did.

Q. When she first broached that subject to you, do you remember when that was, by the way?

A. My first meeting, referring to my daily diary, was on the [117] 20th day of July, I believe, or the 20th day of June, or both, or the 15th, I believe, of June, 1949.

Q. At that time was she seeing you on other matters connected with Mr. Vatuone's estate rather than this?

A. With the administration of her husband's estate.

Q. The thing I want to find out is when she questioned you as to her right to sue the Government for damages. How long after that time was that? A. Oh, maybe two or three weeks.

Q. When she did that, did you give her an answer right away or did you advise her that you would have to look into the matter?

(Testimony of Robert McMahon.)

A. I had Mr. Thomas C. Ryan in mind as being a capable rising attorney and as familiar with matters of that kind, and so I took the matter up with yourself, Mr. Tom Ryan.

Q. First of all, you saw her on June 20th and then she asked you this question two or three weeks after that date. Would that be about the middle of July, 1949? A. Approximately.

Q. After that time did you have some conversation with me? In regard to her rights in this matter? A. I did.

Q. After those conferences did you advise her as to her rights?

A. I did, and also in your presence, and you agreed. [118]

Q. When we had that conference with the lady did you advise her that in your opinion she had a right to sue the Government but she must first stop her application for compensation?

A. That is correct.

Q. Did you at that time also discuss with her the amount she would receive by way of compensation and the contingencies which had to exist for her to keep on receiving it?

A. I recall phoning to Mr. Sutherland—I think it was on the 22nd of July—at this building 201 or 207 at Fort Mason, and I was told there that he was off for the day. And subsequently I contacted Mr. Sutherland on the telephone, and I made notes at the time of the conversation, and he in substance told me what the libellant here is testifying to about

(Testimony of Robert McMahon.)

what the base pay would be. I think he said \$270 or words to that effect, and 35 per cent of that to the widow and 10 per cent of that to the minor child.

Q. Did he tell you that the 35 per cent and the 10 per cent was not based on the \$270 base pay but on a total maximum of \$175 a month?

A. That is correct.

Q. He told you that?

A. He did. I have my notes to show that.

Q. That was not the original question, I think. You did not answer the question I tried to ask.

Mr. Collett: Are you going to testify for him now? [119]

(Question read.)

Q. (By Mr. Ryan): When you told her as to what in your opinion she would receive by way of compensation and what her rights were as to bringing suit for damages against the Government, which contingency did she choose to follow?

Mr. Collett: If the Court please, I will submit—withdraw the objection.

A. Without going into detail, I think it would amount to \$78 a month if she accepted the compensation. Otherwise she could bring suit.

Q. Which contingency did she choose to follow?

A. She chose—

Mr. Collett: I object to what she chose to follow. I submit on the record here what the facts show at the time of the complaint having been filed

(Testimony of Robert McMahon.)

and the award having been made will speak for themselves as whether she chose one thing or the other, whether there was any choice to have been exercised.

The Court: What if any instructions did she give to Mr. McMahon in the light of her discussion.

Mr. Ryan: Thank you, your Honor.

Q. What instructions, if any, did she give you as to what she wanted yourself and myself to do as her attorneys?

A. Having in mind, and based upon my conversation with Mr. Sutherland she decided she would bring suit in the Federal Court for damages for the death of her husband.

Q. Acting as her attorney did you send this telegram to the [120] Bureau of the Employee's Compensation in Washington, D. C. (handing document to witness)?

A. I did.

Q. Did you send this telegram by full rate telegram on the day on which it is dated, July 2, 1949?

A. I did.

Mr. Ryan: I offer this telegram in evidence as our next exhibit.

The Court: It may be received and marked.

(Libellant's Exhibit 9 was thereupon received in evidence and read.)

Mr. Collett: If the Court please, I would like to note an objection to the telegram for the record. The proper foundation has not been laid, that the fee was paid, that the telegram was actually trans-

(Testimony of Robert McMahon.)

mitted, there is no record that it was received, when it was received by the Agency or on what authority the United States would have to recognize Mr. McMahon in behalf of Mrs. Vatuone.

The Court: The objection is overruled.

Mr. Ryan: May it please your Honor, I do not think I have to ask the question on this: The record in front of you shows, does it not, that the original libel was filed on August 1st, 1949, in this Court?

The Court: Yes.

Mr. Ryan: And then I think the file also shows an affidavit of Daniel B. Ryan, my brother, showing that on the same date, [121] August 1, 1949, "He personally served a copy of the libel in the above-entitled action on the United States Attorney for the Northern District of California by giving a true copy thereof to Elmer Collett, Deputy District Attorney for said District; affiant on August 1st, 1949, mailed a copy of the libel herein by registered mail to the Attorney General of the United States in Washington, D. C." And I believe that libel was filed in this Court on August 3, 1949.

Mr. Collett: I think the record speaks for itself.

The Court: Whatever the record shows.

Q. (By Mr. Ryan): Then, Mr. McMahon, I think the rest of the correspondence with the United States Government came to my office, is that right?

A. That is correct.

Mr. Ryan: I will have to testify to that. That is all, of Mr. McMahon.

(Testimony of Robert McMahon.)

Cross-Examination

By Mr. Collett:

Q. You say it was two or three weeks after the 15th of June that you discussed with her the question of filing an action against the United States?

A. Approximately, yes.

Q. She advised you she had filed a claim for compensation?

A. She had been out once to see Mr. Chandler, been to Fort Mason.

Q. (By Mr. Ryan): Chandler or [122] Sutherland?

A. Mr. Sutherland, yes, and subsequent to that and immediately thereafter she called on me.

Q. (By Mr. Collett): Did you ask her with regard to the matter of filing a suit whether she wanted to file a suit or did she ask you first?

A. She told me she had been to Fort Mason and had signed some papers with Mr. Sutherland, and I inquired as part of my duties to learn whether she would avail herself of what she could do toward seeking damages for the death of her husband.

Q. Did you ever receive any reply to this telegram that you sent, libellant's Exhibit 9?

A. No, at that time—I then consulted with Mr. Thomas Ryan about anything further. I think there was a letter following that, dictated by Mr. Ryan. I think it has been admitted in evidence for identification. It is addressed to the Bureau in Washington, D. C. After that there was no further correspondence by me with Washington.

(Testimony of Robert McMahon.)

Q. Did you have any other communication with the Federal Security Agency other than this exhibit and the letter that you referred to? A. None.

Q. This letter was airmailed on August 30, is that right?

Mr. Ryan: Just a moment. He said he did not know. That was through my office.

A. I did not do that, Mr. Collett. That was through Mr. Ryan. [123] I may have signed as counsel with Mr. Ryan, but Mr. Ryan prepared that correspondence.

Q. (By Mr. Collett): This is the only attempt you made to communicate with the Federal Security Agency?

A. I think Mr. Ryan wrote a few letters.

Q. I mean you. I am asking you.

A. Oh, no, not personally, no. Mr. Ryan took the stroke oar and I was well satisfied with everything in his hands.

Q. Did you prepare the libel or did Mr. Ryan?

A. Mr. Ryan prepared the libel.

Mr. Collett: No further questions.

Mr. Ryan: No questions.

May it please your Honor, I would like to be sworn to identify this correspondence.

THOMAS C. RYAN

was sworn as a witness on behalf of the plaintiff and testified as follows:

The Clerk: Your name is Thomas C. Ryan?

A. Yes, Thomas C. Ryan.

If it please your Honor, I am one of the attorneys of record in this action. This letter, may it please your Honor, which is marked libellant's Exhibit 7 for identification, was dictated and sent under the following circumstances: A check came from Washington to Mrs. Vatuone for \$118 and some odd cents, which she brought into my office, and I had already [124] explained to her that she could not keep a compensation check and maintain a damage suit at the same time. So she brought it into the office and I sent it back from whence it came, to Washington. I prepared a letter, which I dictated on August 19, and signed. I then sent that letter to Mr. McMahon by mail at the City Hall, requesting him to forward it to Mrs. Vatuone, because I did not know her address in Santa Rosa. He forwarded it to Mrs. Vatuone, and eventually it got back to my hands with Mrs. Vatuone's signature on the bottom of it. It was dated August 29th.

The letter was actually airmailed to New York on August 30. The reason I remember that is because I, on my copy, scratched out the date "August 19th" and had the girl, on the original, put in August 30th, the date it was airmailed out. So at this time, your Honor, having identified that letter,

(Testimony of Thomas C. Ryan.)

and being an answer in response to the check which was received, I ask that this letter be marked in evidence, and then I would like to read it to your Honor.

The Court: It may be marked. Eleven days were spent in transit.

Mr. Ryan: Yes, from me to Mr. McMahan, from Mr. McMahan to Santa Rosa, back to his office, and then finally it got into my hands.

(The document referred to was thereupon received in evidence and marked libellant's Exhibit 7.) [125]

The Witness: I might state this, your Honor: I addressed it to this person because the check came through from this particular person to me. I addressed the letter to Mr. William McCauley, Director, Bureau of Employee's Compensation, Federal Security Agency, Federal Security Building, 4th and Independence Avenue, Southwest, Washington 25, D. C.

“Re: Rina M. C. Vatuone and Paulette T. Vatuone,
“Claimants—Case No. X-472308.

“Dear sir:

“Mrs. Vatuone has just delivered to me the compensation order made in the above matter on August 3, 1949, together with a warrant of the Treasurer of the United States numbered 80,949,-975, dated August 8, 1949, and payable to the order of Mrs. Rina M. C. Vatuone in the sum of \$118.12. I am returning this warrant to you and request

(Testimony of Thomas C. Ryan.)

that you vacate the compensation order above mentioned. The reason for this action is that Mrs. Vatuone and her daughter choose to proceed by way of a suit for damages for death against the United States rather than to accept compensation because of the death of their husband and father.

“On July 22, 1949, our associate, Mr. Robert McMahon, telegraphed your agency requesting that Mrs. Vatuone’s application for compensation be withdrawn. [126]

“Said telegram, which your agency must undoubtedly have on file, reads as follows:

“ ‘July 22, 1949

“ ‘Bureau of Employees Compensation,

“ ‘Federal Security Agency,

“ ‘Federal Security Building,

“ ‘4th and Independence Avenue, S.W.,

“ ‘Washington 25, D. C.

“ ‘Request application of Rina Maria Vatuone for compensation on death of Paul D. Vatuone be withdrawn without prejudice. Reason: Contemplate damage suit against United States.

“ ‘ROBERT McMAHON,

“ ‘Attorney for Mrs. Vatuone; 206 City Hall,
San Francisco 2.’

(Testimony of Thomas C. Ryan.)

“Mr. Wm. McCauley, Director,
“Bureau of Employees Compensation,
“Federal Security Agency,
“Federal Security Building,
“4th and Independence Avenue, S.W.,
“Washington, 25, D. C.

“On August 1, 1949, in the District Court of the United States, for the Northern District of California, Southern Division, Mrs. Vatuone, as administratrix of the Estate of Paul D. Vatuone, deceased, filed a libel for damages in the sum [127] of \$100,000.00 against the United States. Said action is entitled Rina Maria Vatuone, as administratrix of the Estate of Paul D. Vatuone, deceased, Libellant, vs. United States of America, Respondent, numbered 25476R in the files of said Court. Said libel and a citation were on the same date served on the United States by delivering a copy of said libel and citation to Frank J. Hennessy, United States Attorney, at San Francisco and mailing a copy of said libel and citation by registered mail to the Attorney General of the United States at Washington, D. C.

“In view of said facts, please make your order vacating said compensation order and do not send any further warrants to Mrs. Vatuone, I enc.

“Sincerely,

“RYAN & RYAN,

“By THOMAS C. RYAN.

(Testimony of Thomas C. Ryan.)

“Please comply with the requests contained in Mr. Ryan’s letter above.

“Dated: August 29, 1949.

“RINA M. C. VATUONE.”

The Witness: Then, may it please your Honor, in answer to that letter that I just read, I received the following letter dated September 8, 1949, from the Bureau of Employees’ Compensation. I personally received this letter in reply to [128] that one, and I offer that one in evidence.

The Court: It may be marked in evidence.

Mr. Collett: Let me see that.

Mr. Ryan: I think you have a copy of that. You should have a copy of all those in your file.

(The document referred to was thereupon received in evidence and marked libellant’s exhibit No. 10.)

Mr. Ryan: This letter, may it please your honor, libellant’s Exhibit 10, is on the stationery of the Federal Security Agency, Bureau of Employees’ Compensation, Washington 25, D. C.:

“September 8, 1949,

“Ryan and Ryan,

“Attorneys at Law,

“800 Phelan Building,

“San Francisco 2, California.

“Gentlemen:

“Your letter of August 19, 1949, relative to Mrs. Rina M. C. Vatuone, widow of Paul D. Vatuone,

(Testimony of Thomas C. Ryan.)

deceased, who was fatally injured June 15, 1949, while employed as rigger helper for the Department of the Army on the U. S. Army Transport 'General D. E. Aultman,' San Francisco Port of Embarkation, Fort Mason, California, and Paulette T. Vatuone, child of this decedent, has been received and referred to the writer for reply. [129]

"The Bureau of Employees' Compensation has no authority of law to vacate the Compensation Order issued in this claim on August 3, 1949.

"The United States Treasury will be requested to hold the compensation check for \$118.12 issued to the order of Mrs. Rina M. C. Vatuone.

"The Attorney General, United States Department of Justice, Washington, D. C., is handling the libel for damages filed by Rina Maria Vatuone, as Administratrix of the Estate of Paul D. Vatuone, deceased, vs. United States of America, Northern District of California, and any future communications concerning the libel suit should be directed by you to the Attorney General, Department of Justice, Washington, D. C.

"Very truly yours,

"DANIEL M. GOODACRE,
"Chief Claim Examiner."

And a copy of that letter was sent to Mrs. Vatuone.

Then, may it please your Honor, another compensation check came through, despite these letters, to Mrs. Vatuone and she brought the check into me

(Testimony of Thomas C. Ryan.)

and requested me to send it back to the Government, and so in compliance with the request, on September 23, 1949, I sent the following letter to the person who sent me the check, who was the chief of the preliminary [130] service section of the general accounting office, claims division, Washington 25, D. C.:

“Re: Z-154352,

“Vatuone, Paul D., deceased.

“Dear Sir:

“On behalf of Mrs. Rina M. C. Vatuone, widow of the above decedent, and Paulette T. Vatuone, his daughter, I am returning to you warrant No. 88-246,693 of the Treasurer of the United States, dated September 1, 1949, and payable to the order of Mrs. Rina M. C. Vatuone in the sum of \$78.75.

“As I wrote Mr. Wm. McCauley, Director of the Bureau of Employees' Compensation, Federal Security Agency, Mrs. Vatuone and her daughter have elected to proceed against the United States on account of the death of Mrs. Vatuone's husband and Miss Paulette T. Vatuone's father by means of a suit for damages for personal injuries which has heretofore been filed in the Federal Court in San Francisco, No. 25476-R.

“Mr. Daniel M. Goodacre, Chief Claim Examiner, wrote me on September 8, 1947, stating that the United States Treasury will be requested to hold the compensation check heretofore sent Mrs. Vatuone in the sum of \$118.12, which we heretofore returned to the Government. His file number on her case is

(Testimony of Thomas C. Ryan.)

X-472308. [131] Please do not send any further monthly checks to Mrs. Vatuone, as she is proceeding against the Government by means of said damage suit. We notified the Government of this election by a telegram sent July 22, 1949, before the compensation order was made by the Bureau of Employees' Compensation.

“Very truly yours,

“RYAN & RYAN,

“By THOMAS C. RYAN.”

I offer that in evidence, your Honor.

The Court: It may be marked.

(The document referred to was thereupon received in evidence and marked libellant's exhibit 11.)

Mr. Ryan: I then received a reply to that letter by a letter under the letterhead of General Accounting Office, Washington 25, D. C., Claims Division, Dated October 24, 1949, as follows:

“Ryan & Ryan,

“Attorneys at Law,

“800 Phelan Building,

“San Francisco 2, California.

“Sirs:

“Reference is made to your letter dated September 23, 1949, wherein it is requested that no further monthly employees' compensation checks be sent to [132] Mrs. Rina M. C. Vatuone in view of the

(Testimony of Thomas C. Ryan.)

filing of a suit for personal injuries against the United States by Mrs. Vatuone and her daughter, Miss Paulette T. Vatuone, on account of the death of Paul D. Vatuone.

“You are advised that the letter has been referred to the Federal Security Agency, Bureau of Employees’ Compensation, Washington, D. C., as a matter for consideration and appropriate action by that office.

“Any further inquiry with regard thereto should be addressed to that office.

“Respectfully,

“FOR THE COMPTROLLER GENERAL OF
THE UNITED STATES,

“E. B. HILLEY,

“Claims Reviewer.”

I offer that letter in evidence.

(The document referred to was thereupon received in evidence and marked libellant’s exhibit No. 12.)

Mr. Ryan: Then, may it please Your Honor, another branch of the Government, that is, the retirement division, wrote some letters requesting Mrs. Vatuone to fill in some forms and she brought them in to me, and they had to do not with compensation but with retirement allowances that he had as [133] Government employee, by which she was to get two dollars a month or twelve dollars apiece a year, and she had to, under the provisions of that law, make

(Testimony of Thomas C. Ryan.)

a choice between accepting compensation or these retirement allowances. So I wrote the following letter to the Retirement Bureau stating that we had already rejected compensation and we would accept the two dollars a month she was entitled to under retirement, and I sent this letter on her behalf:

“January 6, 1950

“Mr. Warren B. Irons, Chief,
“Retirement Division,
“U. S. Civil Service Commission,
“Washington 25, D. C.

“Re: RET-CL:MVH:jf
CSF-174240

“Dear Mr. Irons:

“Replying to your letters of October 31, 1949, and December 12, 1949, this is to advise you that on my own behalf and on behalf of my minor daughter, Paulette Theresa Vatuone, we hereby elect to receive an annuity under the provisions of the Retirement Act rather than dependency compensation under Section 10 of the U. S. Employees' Compensation Act.

“Heretofore we chose the remedy of a suit for damages for personal injuries against the United States rather than accepting the benefits [134] afforded us under the U. S. Employees Compensation Act. On August 1, 1949, in the District Court of the United States, for the Northern District of California, Southern Division, in an action entitled Rina Maria Vatuone, as administratrix of the

(Testimony of Thomas C. Ryan.)

Estate of Paul D. Vatuone, libellant, vs. United States of America, respondent, No. 25476 in the files of said court, I brought suit for damages in the sum of \$100,000.00 against the United States under the provisions of the Public Vessels Act. Prior to that time and on July 22, 1949, my attorneys telegraphed the Bureau of Employees' Compensation at Washington, D. C., requesting that my application for compensation be withdrawn because I was contemplating a damage suit against the United States. Despite said telegram and the filing of said lawsuit, the director of the Bureau of Employees' Compensation made an award of compensation in my case on August 3, 1949. Pursuant to said order, compensation checks were sent to me. However, I did not accept them, but returned them to the Chief of the Preliminary Service Section of the General Accounting Office, Claims Division of Washington. I also notified the director of [135] the Bureau of Employees Compensation that we were returning said checks and not accepting the compensation order made and requested said director to make an order vacating his compensation order.

“In view of the above, I will expect to receive from your office monthly annuities for myself and my daughter under the provisions of the Retirement Act.

“In your letter of October the 31st you state that my daughter and I are each entitled to an annuity

(Testimony of Thomas C. Ryan.)

of \$12.00 per annum. Is that correct, or did you mean \$12.00 per month each?

“Sincerely,

“RINA M. VATUONE.

“RYAN & RYAN,

“By THOMAS C. RYAN,

“Attorneys for Rina M.
Vatuone.”

And I might state in answer to that inquiry they said it was \$12.00 a year and not a month. I offer this letter in evidence.

(The document referred to was thereupon received in evidence and marked libellant's exhibit 13.)

Mr. Collett: Mr. Ryan, will you produce the two letters which you received to which you replied?

Mr. Ryan: I will look through my files and see if I can find them. [136]

If your Honor please, at this time I read into evidence——

Mr. Collett: Before you finish—you are on the stand—I asked you to produce those two letters.

Mr. McMahon: They are not in the file.

Mr. Ryan: I could find those in a few moments.

Mr. Collett: I would like to close out that phase of it.

Mr. Ryan: I am not sure I have the letters. No, I haven't got those in my file.

(Testimony of Thomas C. Ryan.)

Mr. Collett: What did the letter of October 31st contain?

Mr. Ryan: It referred to retirement benefits.

Mr. Collett: And the letter of December 12th?

Mr. Ryan: On the same subject, I haven't got those letters counsel referred to, your Honor.

The Court: What are the letters?

Mr. Ryan: They were letters from the retirement board about this two dollars a month or twelve dollars a year, asking for her to make a choice between compensation and retirement, and I said we had already rejected the compensation so we accepted retirement.

The Court: All right.

Mr. Ryan: At this time, your Honor, I read into evidence the insurance commissioner's 1941 mortality table, showing that a person of the age of 44 years has a life expectancy of 26.1 years, and I also read into evidence the present worth of one dollar per year tables, showing that the present value [137] of an annuity of one dollar per year for 26 years, discounted at 3 per cent, is \$17.87, at 2 per cent it is \$20.12, and I will ask counsel if he will enter into this stipulation. I think it may be in one of his own records. Will you stipulate that death was due to the injury he received in this accident of June 15, 1949?

The Court: That is in the Government's Exhibit. The certificate is in the file offered by Mr. Collett and signed by Doctor Geiger and certified to. Is it stipulated that death was caused proximately as a

(Testimony of Thomas C. Ryan.)

result of the injuries sustained here? Is that the stipulation?

Mr. Ryan: Yes.

Mr. Collett: That is not necessary for me to stipulate. The records show that.

Mr. Ryan: With that the libellant rests.

Mr. Collett: If the Court please, I will at this time renew the motion to dismiss on the grounds, first, there was no election to sue. First, we have here an individual who was an employee of the United States, and that as such an employee of the United States—not a seaman, not a member of the crew of the vessel—that there wasn't any election and that, second, by virtue of the provisions of sections 789 and 746, the United States as the employer of Vatuone was not liable to any greater extent than any other owner of the vessel employing Vatuone in a similar manner would be, and that the [138] Harbor Workers and Longshoremen's Compensation Act would provide the exclusive remedy as to such an employee, and that the United States thereby is not liable to any greater extent, and that the compensation act provides the exclusive remedy on that ground. On the third ground, that the filing of the claim, and the making of the award and the facts of this case constitute a bar to the libellant in any further proceedings.

The Court: I will reserve ruling on the matter.

Mr. Collett: I have only one witness, if the Court please. I would like to call Mr. Sutherland, very briefly.

WALTER ROBERT SUTHERLAND

was called as a witness on behalf of the respondent, and being first duly sworn, testified as follows:

The Clerk: Will you state your full name to the Court?

A. Walter Robert Sutherland.

Direct Examination

By Mr. Collett:

Q. By whom are you employed, Mr. Sutherland?

A. San Francisco Port of Embarkation, Fort Mason.

Q. Where do you live? A. Mill Valley.

Q. How long have you been employed by the San Francisco Port of Embarkation? That is the water transportation division part of the Army?

A. Yes, Department of the Army, Transportation Corps.

Q. Transportation Corps, Department of the Army? [139] A. Yes.

Q. How long have you been employed by the Department of the Army?

A. Three years in the transportation Corps, ten in the Department of the Army altogether.

Q. In your present employment, assignment to duty?

A. At the present time I have only been in that duty less than a month.

Q. What is your present duty?

A. I am claims examiner for the Judge Advocate and Claims Division.

(Testimony of Walter Robert Sutherland.)

Q. In June, 1949, what was your duty?

A. I was contact representative of the Claims and Compensation Unit, Civilian Personnel Branch at Fort Mason.

Q. That is, Department of the Army?

A. That is, yes.

Q. About June 15, 1949, do you recall receiving a report of the death of Paul D. Vatuone?

A. I do.

Q. Did you thereafter endeavor to communicate with Mr. Rina Maria Vatuone? A. I did.

Q. You endeavored to contact her on being notified of the death of Paul Vatuone, is that right?

A. Yes. [140]

Q. Did you succeed in contacting her?

A. We established contact. Whether I succeeded in contacting her first or she did me, I don't recall.

Q. Where did you have your first visit with her?

A. Our first personnel building was building 207, our personnel office, Fort Mason.

Q. Do you recall the date?

A. Not precisely. It was five or six days after the death of Paul Vatuone.

Q. Did you have a conversation with her at that time? A. Yes.

Q. Do you recall the time of day?

A. No, I do not.

Q. Do you recall who was present?

A. Well, Mrs. Vatuone and myself. It was an open office. There were others at a distance.

(Testimony of Walter Robert Sutherland.)

Q. There was no other person who was participating or auditing the conversation as such?

A. No.

Q. Will you give us the sum and substance of that conversation?

A. Well, at the outset I expressed my sympathies and those of the Port in offering such services as we could provide to her in connection with his personnel problems, and so on, and I explained the benefits provided by the compensation Act in such a case. I explained in part, with one omission, such [141] benefits where she was entitled to claim and how she should proceed to claim them, that is, the necessary form work and such supporting documents of the proof of her relationship as the Bureau would require—by that I mean birth certificates, marriage certificates, et cetera.

Q. What benefits did you tell her she was entitled to?

A. I told her she was entitled to 35 per cent of her husband's pay until she died or remarried, and that her minor child was entitled to 10 per cent of that pay until she died, remarried or ceased to be dependent.

Q. You stated there was an omission?

A. There was.

Q. What was that?

A. I omitted to state that for compensation computing purposes the maximum salary that these percentages I just quoted were based upon was \$175 per month.

(Testimony of Walter Robert Sutherland.)

Q. Instead of how much?

A. I didn't follow that.

Q. Instead of how much?

A. Instead of a full 35 per cent of his pay, actually it is 35 per cent of \$175 if the decedent's salary is in excess of \$175.

Q. Did she direct you to prepare forms for presenting a claim?

Mr. Ryan: Just a moment. I object to that on the ground [142] that it is leading and suggestive: Did she suggest that. I have no objection if he asks what he did.

The Court: State what you did, please, Mr. Sutherland.

A. I went into further explanation as to the forms that were required and offered my services specifically that I would draft in longhand on the form the necessary replies to the questions on a claim for compensation and have it typed up by one of my typists for her signature.

Q. Did you have any discussion with regard to filing a suit against the United States?

A. I don't recall any.

Q. Do you recall any discussion with regard to recovery from any other source than the United States as a set-off against any compensation that she might receive?

A. I honestly do not recall that subject coming into that particular conversation.

Q. You heard Mrs. Vatuone testify to the effect

(Testimony of Walter Robert Sutherland.)

that she could file suit and any compensation that she might receive would be a set off as against any recovery that she would make in the suit?

A. I heard the testimony, yes.

Q. Did you have any such conversation with her?

Mr. Ryan: I object to that on the ground that it is already asked and answered. He said he does not recall whether he did or not. [143]

A. I don't recall the subject of a suit coming into that particular conversation.

Q. (By Mr. Collett): Did you discuss that in any other conversation with her?

A. Not to my recollection.

Q. Thereafter did you prepare—what is the designation on the form for filing a claim in the event of death? A. C-A 5.

Q. Did you thereafter have such a form typewritten from the information that was given to you by her? A. Yes.

Q. I will show you respondent's exhibit D, CA-5. That is your signature, is it? A photostatic copy? A. It is.

Q. Did she thereafter provide the various documents which were attached to it: The marriage license, certificate of marriage, abstract of marriage record, the certification of the birth of Paulette Teresa Vatuone, and the certified copy of the death certificate of the San Francisco Department of Public Health?

A. She provided all except the death certificate.

Q. How did you obtain the death certificate?

(Testimony of Walter Robert Sutherland.)

A. I obtained that directly from the Department of Public Health by letter.

Q. I will show you this exhibit, Respondent's Exhibit D, and the other documents that were enclosed in here, in addition to [144] the CA-5, were CA-3—what is a CA-3?

A. CA-3 is the employer's report of the death.

Q. And that was signed by you, was it, on the 24th of June 1949?

A. Yes.

Q. What form is a CA-2?

A. That is the official superior's report of injury.

Q. Who prepares that?

A. In this case an immediate superior or someone in an eschelon or one or two above him.

Q. Was that form received by you in the regular course of the performance of your duties?

A. It was received in a routine manner. I had telephoned and asked them to expedite it.

Q. CA-1—what form is that?

A. That is the employees' notice of occupational injury or illness.

Q. What purpose does it serve?

A. Primarily it is for the employee to make his own report to the Bureau of his own injury and claim that it was occupational. When the employee is not available or cannot execute his own, the Bureau's regulations and instructions are that the employer or someone should execute it in his behalf.

Q. Who executed it in his behalf?

A. I did. [145]

(Testimony of Walter Robert Sutherland.)

Q. And this bears your signature, does it?

A. Yes.

Q. Form No. 2307, TC7. That is a Medical Report of Civilian Industrial Accident. Do you receive that and forward it to the Federal Security Agency or is that forwarded directly?

A. That is a local form of our dispensary. We forward it to the Bureau as a matter of policy.

Q. There is an affidavit relating to representatives of deceased's beneficiary. Was that prepared in your presence?

A. No, I am not familiar with that form.

Q. I show you the form. Have you ever seen that before?

A. I have seen it.

Q. Did you receive this form from Mrs. Vatuone?

A. I cannot recall just exactly the circumstances under which I received it, but I do know that it came to my office.

Q. Did you at any time have any conversation with Mrs. Vatuone regarding any rights that she might have to file suit against the United States in addition to filing a claim against the United States for compensation under the employees' compensation act?

A. I talked with someone about that time—I can't recall whether it was Mrs. Vatuone or a telephone call from a gentleman that came along a week or two later on the subject.

Q. Do you recall a telephone conversation from a gentleman?

(Testimony of Walter Robert Sutherland.)

A. Yes, I recall having had one. [146]

Q. Do you recall his name?

A. He identified himself as Mr. McMahon or McCann. I think it was McMahon.

Q. How did he represent himself, if you recall?

A. I am not definitely certain whether it was a friend of Mrs. Vatuone or Mrs. Vatuone's attorney.

Q. What was the substance of your conversation?

A. That Mrs. Vatuone was electing to sue and he was notifying—I don't recall the exact words, but the essence of it was he was notifying the Bureau to drop her claim for compensation and he was also notifying me that she did not want to proceed any further, and the question of compensation benefits was put to me as to what she was entitled to, and I explained the percentages—35 for the widow, 10 for the child.

Q. Would that refer to the amount \$175 in that conversation?

A. I don't recall. It got down to dollars and cents, in the course of the conversation, where it got specific, but I am very hazy about it. I would like to explain, if I may, that since that time I have interviewed hundreds of other people, not all as tragic perhaps, but through the course of so many interviews, unless something particularly salient impresses me, I do not retain it.

The Court: Do you make a memorandum of the phone calls? A. No your Honor.

Mr. Collett: No further questions. [147]

(Testimony of Walter Robert Sutherland.)

The Court: Proceed.

Cross-Examination

By Mr. Ryan:

Q. Mr. Sutherland, you mentioned the omission that when you were giving this figure of 35 per cent and 10 per cent of the salary, you forgot to mention \$175 a month was the maximum. Actually Mr. Vatuone was earning more than \$175 a month, wasn't he?

A. Yes, he was earning more than that.

Q. He was earning around \$270 a month, wasn't he?

The Court: His average shows \$250.

Q. (By Mr. Ryan): Let me ask you this. This is the thing I want to get at mostly: Counsel questioned you about the conversation Mrs. Vatuone had with you in which she said you mentioned you could get your compensation and then sue the United States, but you would have to deduct from the amount of the award against the United States the amount of compensation paid out, and your answer was you did not recall that.

A. I do not recall actually having that discussion.

Q. But, Mr. Sutherland, at that time it was your impression, wasn't it, that a person had a right to file a damage suit and file a compensation claim at the same time? That was your impression?

Mr. Collett: I object to what his impression was.

The Court: Overruled.

A. I had no specific impression because I am not

(Testimony of Walter Robert Sutherland.)
qualified. [148] I am a layman and do not know the law, but had it been put to me, it did seem a logical course.

Q. (By Mr. Ryan): As a matter of fact, you had a lot of claims like this, didn't you, where Government employees were hurt by third parties, they get their compensation from the Government, and they would sue the third parties, but the Government would get back the money they paid in compensation from the third party tort feasers? You had a lot of cases like that, didn't you?

A. Not a lot.

Mr. Collett: I object to that as wholly immaterial.

The Court: I think he has sufficiently testified on the other point. He said it seemed logical.

Mr. Ryan: I will put one more question then:

Q. You are not here denying that you might have told her that she could sue and get compensation at the same time; that is correct, isn't it?

A. I wouldn't tell her she could sue because I wouldn't know under what circumstances anyone could sue.

Q. You won't deny the fact, as she testified, that she asked you about the suit and the fact that she could sue? And the amount would be reduced by the amount of compensation she was paid? You won't deny that you told her that, will you?

A. In the words that you put it, I will.

Q. I do not mean in my words, but in general language, the inquiry came up? As to whether or

(Testimony of Walter Robert Sutherland.)

not she could get compensation [149] and also would have the right to sue. You don't deny that that subject matter came up, will you?

Mr. Collett: I object, if the Court please. He has answered the question. It is purely argumentative now. There are express provisions in the Act with regard to other claims and the set off as against compensation in the Compensation Act itself. Now the witness has been asked whether he would deny it.

The Court: You may answer the last question if it is clear to you.

Mr. Collett: Repeat the question.

Mr. Ryan: I think he understands it.

The Witness: I at no time told Mrs. Vatuone or anyone else that they could sue—I mean because I do not know the circumstances under which anyone can sue for anything. But I have had similar questions put to me throughout my experience and I won't deny Mrs. Vatuone may have put the same question to me, that if he claims for compensation and recovers from any other source other than private insurance, that is, through suit, most particularly third party cases, that the Bureau will use that as an offset against any compensation that they pay the claimant.

Q. Going one step further, neither will you deny that you may have told her that if such a situation arose in this case, the amount that Fort Mason, the Compensation Bureau pays her, would be deducted from the amount of recovery in the

(Testimony of Walter Robert Sutherland.)

damage [150] suit against the United States? You won't deny that either, will you?

A. I won't deny it.

Mr. Ryan: I think that is all, your Honor.

Redirect Examination

By Mr. Collett:

Q. Do I understand you, Mr. Sutherland, to say that you do not deny that you told her if she recovered in an action against the United States that the amount of compensation she would receive would be offset as against it?

A. The amount she would receive through any other source would be offset against the compensation.

Q. Is there any provision in the Compensation Act with regard to offset as against compensation?

Mr. Ryan: I object on the ground that calls for the conclusion of the witness. The Compensation Act itself is the best evidence.

The Court: Overruled.

A. There is a section—I can't quote it or identify it by section number—that specifies that if the claimant recovers from another source and it appears to bear altogether on third party cases, that that amount will be used as an offset or credit to his compensation.

Q. (By Mr. Collett): You have in mind Section 777 of Title 5 of the United States Code—

Mr. Ryan: Your Honor, I would like to inquire

(Testimony of Walter Robert Sutherland.)

as to whether [151] he is inquiring as to his present knowledge. He may have learned a lot since the last June.

Q. (By Mr. Collett): I will ask you this: After June 15 were you aware of the existence in the code or the Compensation Act of a section pertaining to the adjustment in the case of a receipt by an employee of money and property in satisfaction of liability of a third person? A. Yes.

Q. Was the section you had in mind with regard to a setoff as against any compensation that might be due on a recovery by a person?

A. Yes.

Q. Have you received any instructions in your department with regard to advising any claimant to sue the United States? A. Yes.

Q. What was that?

Mr. Ryan: Just a moment. What do you mean? Since this time or before it?

Mr. Collett: Prior to June 15, 1949.

A. Yes, I had been specifically instructed, prior to June 15.

Mr. Collett: With regard to what?

A. With regard to advising or discussing suits or any legal aspects, outside of the Compensation Act with any claimant.

Q. In your conversations with Mrs. Vatuone did you so abide by those instructions? [152]

Mr. Ryan: I object to that on the ground that it calls for the opinion and conclusion of the witness, and furthermore he says he does not remember.

(Testimony of Walter Robert Sutherland.)

The Court: Yes. Well, I will allow it.

A. Do I answer the question?

The Court: Yes, you may answer the question.

A. As I say, I do not recall discussing the aspects of a suit with Mrs. Vatuone.

Mr. Collett: That is all.

Mr. Ryan: That is all.

The Court: We will resume then tomorrow at 10:00 o'clock?

Mr. Ryan: I understand counsel is finished with his evidence?

Mr. Collett: That is all.

Mr. Ryan: Then we can argue the matter tomorrow morning?

The Court: Yes.

(Thereupon on June 7th, 1950, counsel for the respective parties argued the matter to the Court, the matter to be submitted when the briefs of the counsel are filed.)

Certificate of Reporter

We, Official Reporters and Official Reporters pro tem, certify that the foregoing transcript of 153 pages is a true and correct transcript of the matter therein contained as reported by us and thereafter reduced to typewriting, to the best of our ability.

/s/ J. F. SWEENEY,

/s/ K. PECK.

[Endorsed]: Filed September 21, 1950. [153]

In the United States Court of Appeals
for the Ninth Circuit

No. 25476-R In Admiralty

UNITED STATES OF AMERICA,

Appellant,

vs.

RINA MARIA VATUONE, as Administratrix of
Estate of PAUL D. VATUONE, Deceased,
Appellee.

CLERK'S CERTIFICATE TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this court in the above-entitled case and that they constitute the record on appeal herein as designated by the parties:

Libel for Damages for Wrongful Death.

Answer.

Memorandum Opinion and Order.

Findings of Fact and Conclusions of Law.

Decree for Damages.

Notice of Appeal.

Petition for Appeal.

Order Granting Petition for Appeal.

Assignment of Errors.

Citation on Appeal.

Affidavit of Mailing copies of Notice of Appeal, etc.

Designation of Apostles on Appeal and Praecipe therefore.

One volume of testimony.

Libellant's Exhibit No. 1, for identification.

Libellant's Exhibits Nos. 2 to 3, inclusive.

Libellant's Exhibit No. 4, deposition.

Libellant's Exhibits Nos. 5 to 7, inclusive.

Libellant's Exhibit No. 8, deposition.

Libellant's Exhibits Nos. 9 to 13, inclusive.

Respondent's Exhibits A, B, C and D.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 20th day of April, 1951.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ E. H. NORMAN,
Deputy Clerk.

[Endorsed]: No. 12906. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Rina Maria Vatuone, as Administratrix of the Estate of Paul D. Vatuone, Deceased, Appellee. Apostles on Appeal. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed April 20, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 12906

RINA MARIA VATUONE, as Administratrix of
the Estate of Paul D. Vatuone, Deceased,
Appellee,

vs.

UNITED STATES OF AMERICA,
Appellant.

APPELLANT'S STATEMENT OF POINTS TO
BE RELIED ON ON APPEAL AND DESIG-
NATION OF PORTION OF RECORD TO
BE PRINTED

Appellant adopts as points on appeal the Assignment of Errors included in the Apostles on Appeal on file herein.

Appellant designates for printing the entire Apostles on Appeal on file herein except that, as to the Exhibits, only Libellant's Exhibit 4 and Libellant's Exhibit 8 need be printed, and that the remaining Exhibits be considered by the Court in their original form.

/s/ FRANK J. HENNESSY, R.,
United States Attorney.

/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General, Proctors
for Appellant.

So Ordered:

.....
 Senior United States Circuit
 Judge.

[Endorsed]: Filed April 28, 1951.

[Title of Court of Appeals and Cause.]

STIPULATION AS TO EXHIBITS

It Is Hereby Stipulated and Agreed by and between Appellant and Appellee, acting by and through their respective proctors, that in order to save further costs of printing, all exhibits heretofore admitted in evidence herein, except Libellant's Exhibits Nos. 4 and 8, need not be printed, and that the same may be considered by the Court in their original form.

Dated this 26th day of April, 1951.

/s/ FRANK J. HENNESSY, W.P.,
 United States Attorney.

/s/ KEITH R. FERGUSON,
 Special Assistant to the Attorney General, Proctors
 for Appellant.

RYAN & RYAN,
 By /s/ THOMAS C. RYAN,
 /s/ ROBERT McMAHON,
 Proctors for Appellee.

So Ordered:

/s/ WILLIAM HEALY,

/s/ HOMER BONE,

/s/ WM. E. ORR,

United States Circuit Judges.

[Endorsed]: Filed April 28, 1951.

